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No. 82-_____

In The

# Supreme Court of the United States

October Term, 1982

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KAWASAKI MOTORS CORPORATION,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

---o---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---o---

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## QUESTIONS PRESENTED

1. WHETHER THE GENERAL COUNSEL'S INTENTIONAL FAILURE TO PROVIDE WITNESS AFFIDAVITS IN EXISTENCE AT THE TIME OF CROSS-EXAMINATION WAS A DENIAL OF FUNDAMENTAL DUE PROCESS IN VIOLATION OF THE JENCKS ACT, 18 USC § 3500 AND THE RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD.
2. WHETHER THE GENERAL COUNSEL'S FAILURE TO TIMELY PROVIDE WITNESS AFFIDAVITS, ITS SURREPTITIOUS ATTEMPTS TO TAPE-RECORD TRIAL CONVERSATIONS AND ITS IMPERMISSIBLE ATTEMPTS TO EXAMINE OPPOSING COUNSEL'S TRIAL PAPERS AMOUNT TO AN INTRUSION OF THE ATTORNEY CLIENT PRIVILEGE AND VIOLATION OF FUNDAMENTAL DUE PROCESS SUFFICIENT TO WARRANT A FINDING THAT KAWASAKI WAS PER SE PREJUDICED BY SUCH CONDUCT.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---o---

Petitioner, Kawasaki Motors Corporation, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 14, 1982.

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not officially reported, but is reproduced in the Appendices to this Petition as Appendix A.

The opinion of the National Labor Relations Board, dated August 8, 1981, is reported at 257 NLRB No. 69 (1981) and is reproduced in the Appendices to this Petition as Appendix B.

The opinion of the Administrative Law Judge, dated January 29, 1981, is also reported at 257 NLRB No. 69 (1981) and is reproduced in the Appendices to the Petition as Appendix C.

## JURISDICTION

The Judgment and Memorandum opinion of the Court of Appeals for the Ninth Circuit was entered on September 14, 1982, and is reproduced in Appendix A to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Two statutes cited in this Petition deal with jurisdictional matters, while the other is a fundamental portion of the argument presented in this Petition.

The jurisdictional statutes provide as follows:

29 U.S.C. § 160(f):

> (f) Review of final order of Board on petition to Court. Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was

alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in Section 2112 of Title 28, United States Code (28 USCS § 2112). Upon filing of such petition, the court shall proceed in same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 U.S.C. § 1254:

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

The substantive statute involved herein provides as follows:

18 U.S.C. § 3500:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall exercise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, the trial is continued to an adjudica-

tion of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

## DESIGNATION OF CORPORATE RELATIONSHIPS

The information to be supplied under Rule 28.1 is as follows: The Kawasaki plant in Lincoln, Nebraska, is wholly owned by Kawasaki Heavy Industries, Akashi, Japan. The Lincoln facility is divided into two distinct corporate entities, Kawasaki Motors Corporation, and Kawasaki Motors Manufacturing. There are no other subsidiary companies owned by any of the corporate entities.

## STATEMENT OF THE CASE

The jurisdiction of the Circuit Court below was invoked pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. Kawasaki Motors Corporation (hereinafter "Kawasaki") sought review of a decision entered by the National Labor Relations Board (hereinafter "the Board") in favor of the charging party, the United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter "UAW") and the General Counsel for the Board. That decision found that Kawasaki had violated § 8(a)(1) of the Act, had unlawfully discharged Dan Bennett, and ordered another election.

Kawasaki operates a manufacturing facility in Lincoln, Nebraska, with corporate offices located in Santa Ana, California. The Lincoln facility produces motorcycles, jet skis, and other recreational vehicles. The UAW has successfully attempted on

several occasions to organize the employees at Kawasaki's facility.

Following the second election that it lost, the UAW filed objections to the election. The Complaints were consolidated, and a 13-day hearing was held over a period of time from August 14, 1979 to January 14, 1980, to determine the lawfulness of Kawasaki's conduct. It is the General Counsel's conduct and trial tactics during this hearing that are at issue in this Petition.

**A. The Refusal to Provide Affidavits.**

The General Counsel's proof of alleged violations was introduced through testimony of employees such as Connie Clare, Dennis Moore, Greg Harm, Bruce Berg and Tom Esch. In all, the General Counsel called a total of 16 witnesses. The Administrative Law Judge (hereinafter "ALJ") necessarily weighed the credibility of the witnesses in determining whether the General Counsel had in fact proved the allegations in the Complaint, since contradictory testimony was presented on behalf of Kawasaki in virtually every instance.

The Board's Rules and Regulations, at Section 102.118 provide in pertinent part as follows:

> (b)(1) Notwithstanding the prohibitions of subsection (a) of this section, after a witness called by the General Counsel or by the charging party has testified in a hearing upon a complaint under Section 10(c) of the Act, the Administrative Law Judge shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the General Counsel which relates to the

> subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Administrative Law Judge shall order it to be delivered directly to the Respondent for his examination and use for the purpose of cross-examination.

This section was modeled directly after the decision in *Jencks v. United States*, 353 U.S. 657 (1977), and the subsequent statute, 18 U.S.C. § 3500, commonly referred to as the Jencks Act.

Due to the complexity and length of the trial, a recess was called during the months of October and November. During that time period, employees Berg and Harm gave affidavits to the United States Department of Labor which pertained to the underlying facts of this case. When Berg and Harm were then produced for cross-examination when the hearing resumed, Kawasaki moved for the production of any and all witness affidavits, pursuant to § 102.118. The General Counsel acknowledged the existence and its possession of these Department of Labor affidavits, but intentionally refused to produce them, based upon its own interpretation that they were not covered by the applicable rules. It is not known what potentially prejudicial and inconsistent statements are contained in those affidavits.

The General Counsel also repeatedly failed to timely produce affidavits of key witnesses who testified concerning such allegations as threats of plant closure, unlawful captive audience speeches and other potentially unlawful threats and statements. The ALJ necessarily relied on and credited this testimony in reaching his decision (See Appendix C).

For example, after Kawasaki's counsel had been tendered several affidavits given by employee Clare, it began its cross-examination. During her testimony, it was revealed that Clare had in fact given the Board another affidavit that was not produced by the General Counsel. The General Counsel then informed the ALJ that it had "discovered" the missing Clare affidavit and tendered it to Kawasaki.

On the ninth day of the trial, well after the General Counsel had ceased calling its witnesses and rested its case, it was brought to the attention of the ALJ that an affidavit given by employee Moore had not been turned over to Kawasaki even though that affidavit had been in the possession of the General Counsel when Moore testified.

Later, it was also discovered that the General Counsel had in its possession two statements from Harm, one statement from Esch, and one statement from Berg. These statements, were not provided to Kawasaki's counsel prior to the cross-examination of these witnesses, even though the appropriate request was made.

The General Counsel similarly failed to timely provide all statements made by union organizer, Tom Flores. It was later discovered that the General Counsel had still another affidavit given by Berg that had not been provided. In all, a total of nine affidavits were not timely produced, while the two other affidavits given by Harm and Berg have not been seen and were intentionally withheld by the General Counsel.

**B. Other Improper Trial Conduct.**

In addition to the failure to properly provide all

witness affidavits, counsel for the General Counsel engaged in other forms of trial misconduct. For example, the General Counsel examined the trial papers, notes and exhibits that had been prepared by Kawasaki's counsel. This unheard of conduct was done while Kawasaki's counsel was away from his table at the rear of the room, obviously without permission, and occurred during Bennett's cross-examination. Rather than attempt to describe this conduct, Kawasaki will let the record speak for itself:

> Mr. Sykes: Don't come over and help yourself to my stuff right now, Counsel.
>
> Judge Herzog: Counsel, don't do that.
>
> Mr. Sykes: Put the document back.
>
> Judge Herzog: You have no right to pick up papers, respondent's counsel's work papers.
>
> Mr. McCarthy: I was looking at Respondent's 7 which he did not show us.
>
> Judge Herzog: You were looking at all of his papers. I do not understand. I have never seen that happen in a courtroom before. (T486)[1]

The General Counsel also attempted to tape-record portions of the hearing and/or conversations between Kawasaki's counsel and its representatives. Prior to the testimony of the first witness, the ALJ noticed a tape recorder underneath a stack of papers at the General Counsel's table. He instructed the General Counsel to take the recorder out of the courtroom or put it away.

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[1]The above reference refers to the trial transcript. Kawasaki is willing to provide a certified copy of that transcript should this Court deem it to be necessary.

The General Counsel argued that it was being used to record testimony of the first witness. However, the recorder was placed on the table nearest to the respondent's counsel, not on the opposite end nearest the witness stand. The ALJ strongly warned the General Counsel about such surreptitious conduct and ordered that the recorder be removed. Nevertheless, the ALJ later remarked that ". . . the Trial Court is entitled to know about it and is not entitled to be argued with when he tells you to turn it off, and then the thing does not get turned off for some, well —." (T1359).

The issue of tape recordings arose again later in the hearing in a different context. The General Counsel attempted to prove a variety of § 8(a)(1) violations through witnesses who attempted to reconstruct what was said at certain employee meetings. However, it was later discovered that the General Counsel had verbatim recordings of these meetings. These tapes clearly revealed that the alleged violations had not occurred.

When this evidence was exposed, the ALJ ordered that the tapes be transcribed. It is interesting, and rather suspicious, that after the ALJ found out about the existence of these tapes and ordered that they be transcribed, the General Counsel decided to withdraw the § 8(a)(1) allegations with respect to certain speeches.

**C. The Rulings Below.**

The ALJ determined that Kawasaki violated Section 8(a)(1) and 8(a)(3) of the Act by its conduct and in the discharge of Dan Bennett, and ordered another election. The ALJ strongly rebuked the Gen-

eral Counsel's conduct, but did not find that Kawasaki was prejudiced by the General Counsel's tactics. That decision is reproduced in its entirety at Appendix C.

The Board affirmed the ALJ's decision. It also chose to rebuke the General Counsel's conduct, and stated that the actions constituted undisputed errors, though it too ruled that the conduct was not sufficient to prejudice the outcome of the case, since the ALJ could rely on other facts in the record. The Board further ruled that the General Counsel had no affirmative duty to supply the affidavits given to the Department of Labor by Berg and Harm during the trial recess. Its decision is reproduced in its entirety at Appendix B.

On Appeal, the Court of Appeals enforced the Board's Order. The Court also chose to chastise the trial procedures used by the General Counsel. Further, it found that according to the Board's rules and regulations, the General Counsel was required to produce the affidavits given by Harm and Berg to the Department of Labor. However, despite the fact that Kawasaki does not know what is contained in those affidavits, the Court ruled that Kawasaki could point to no actual prejudice, and hence affirmed the Board's decision. The Court's memorandum order is reproduced in its entirety as Appendix A.

The ALJ specifically relied on witness testimony concerning the alleged § 8(a)(1) violations in ruling that Bennett was unlawfully discharged. Without the withheld affidavits, it is not known how these witnesses' credibility would have been affected. Further, the examination of Kawasaki's trial papers by the General Counsel occurred right in the middle

of Bennett's cross-examination. With the repeated and intentional Jencks Act type of violations that occurred, coupled with the framework of an entire trial tainted by procedural improprieties and irregularities on the part of the General Counsel, Kawasaki submits that this Petition must be granted to address these issues.

## ARGUMENT

**The writ should be granted to resolve the conflict among the administrative and criminal forums concerning the harmless error standards to be applied for nonproduction of documents under the Jencks Act.**

The decision below conflicts with this Court's ruling in *Jencks v. United States,* 353 U.S. 657 (1957) and its progeny. The *Jencks* decision basically held that a defendant has a right to examine all pre-trial affidavits of government witnesses after direct examination and prior to cross. This procedural development was subsequently codified into what is now known as the Jencks Act, 18 U.S.C. § 3500.

In *NLRB v. Adhesive Products Corp.,* 258 F.2d 403 (2d Cir. 1958), the court held that the Jencks Act provisions also applied in NLRB hearings. The Board affirmatively recognized this procedural requirement in *Ra-Rich Manufacturing,* 121 NLRB 700 (1958), and subsequently modified its own procedural rules and regulations (29 *C.F.R.* § 102.118) in conformity with the *Jencks* decision.

The application of the Jencks Act to Board proceedings was later articulated in *Harvey Aluminum v. NLRB,* 335 F.2d 78 (9th Cir. 1964). The Ninth Circuit held that under Section 102.118 the NLRB had to

produce documents held by other government agencies. In response to a Board argument that the Jencks Act was binding only in a limited manner, the court stated:

> The rule applies to proceedings of the Board because " 'the laws under which these agencies operate prescribe the fundamentals of fair play.' Their proceedings must 'satisfy the pertinent demands of due process.' " Communist Party of the United States v. Subversive Activities Control Bd., 102 U.S. App. D.C. 395, 254 F.2d 314, 327 (1958).

*Id.* at 753.

It is quite clear that the Board has thus chosen to adopt the identical procedural protections contained within the Jencks Act. Neither the Board nor the courts have attempted to limit its application in these administrative proceedings. This Court is now asked to determine whether the penalties for non-compliance with the Act which have been articulated in criminal cases will apply with equal force in the administrative setting.

**A. The general counsel's failure to produce two witness affidavits in violation of the Board's rules and regulations constitutes reversible error requiring a new trial.**

In the opinion below, the Ninth Circuit Court of Appeals interpreted the Board's Rules and Regulations and ruled that the affidavits given by witness Harm and Berg to the Nebraska Department of Labor, which occurred during a trial recess, should have been produced under Section 102.118. This ruling was contrary to the interpretation of both the Board and the Administrative Law Judge. The court con-

cluded, however, that even though some of the underlying fact findings might have been dependent on their testimony, ". . . still the conclusion reached that Kawasaki had been guilty of unfair labor practices would remain." (Appendix A, page 5).

The court's ruling is clearly contrary to the harmless error doctrine that governs such Jencks Act proceedings. Since Kawasaki has never received nor observed these statements, the court must have presumed that the error was harmless and that no prejudice occurred. Such a presumption of harmless error clearly cannot stand in light of this Court's rulings in similar factual settings.

In *Clancy v. United States,* 365 U.S. 312 (1961), this Court held that where the government did not produce verbatim transcripts which were required under the Jencks Act, the conviction could not stand. In response to the government's assertion that this nonproduction was merely harmless error, the Court stated, "Since the production of at least some of the statement withheld was a right of the defense it is not for us to speculate whether they could have been utilized effectively." *Id.* at 316.

The Court was confronted with a similar situation in *Goldberg v. United States,* 425 U.S. 94 (1976). In addressing the harmless error argument, it stated, "Since courts cannot speculate whether [Jencks Material] could have been utilized effectively at trial, . . ., the harmless error doctrine must be strictly applied in Jencks Act cases." *Id.* at 109, n. 21 (quoting *Clancy v. United States, supra.)*

The policy concerns and procedural protections established by this Court in dealing with Jencks Act violations has led other federal courts to grant new

trials, remands for hearings or reversals under similar factual settings. *See, United States v. Beasley,* 576 F.2d 626 (5th Cir. 1978); *Lee v. United States,* 368 F.2d 834 (D.C. Cir. 1966); *United States v. Prince,* 264 F.2d 850 (3d Cir. 1959); *Bergman v. United States,* 253 F.2d 933 (6th Cir. 1958).

The courts have been even more discerning where the failure to provide the documents was intentional or flagrant. In *United States v. Hilton,* 521 F.2d 164 (2d Cir. 1976), the court was confronted with a fact situation where it appeared that the prosecution had deliberately failed to disclose a Jencks Act document. The court stated, "[A] new trial is warranted if evidence is merely material or favorable to the defense." *Id.* at 166. The court remanded the case for a factual determination on the failure to provide the required documents. Similarly, the Fifth Circuit in *United States v. Beasley, supra,* quoting from *Rosenberg v. United States,* 360 U.S. 367 (1959) set out the governing legal standards, stating, "[A]n appellate court should order a new trial unless the circumstances justify the conclusion that a finding that such a denial was harmful error would be clearly erroneous." 576 F.2d at 629.

In the instant case, there is no dispute that the General Counsel had two additional affidavits of witnesses Berg and Harm which they intentionally refused to produce. Kawasaki has absolutely no idea as to what those affidavits may contain. It is quite incredible for the court of appeals to require Kawasaki to show how they were prejudiced by the lack of these affidavits, when Kawasaki does not even know what information the affidavits contain.

The court of appeals obviously presumed that no

prejudice had occurred. If the authorities cited herein have any precedential value at all, and if the Respondents in Board proceedings are to obtain the procedural protections that they are entitled to under Section 102.118 and the Jencks Act, then the ruling below simply cannot stand. Neither the Board nor the courts have ever ruled that the Jencks Act protections apply in only limited fashion to Board proceedings. Hence, based upon the authorities set forth above, Kawasaki's petition must be granted.

**B. The General Counsel's trial conduct, Jencks Act violations and infringement upon the attorney-client privilege constitute reversible error requiring a new trial.**

The Court of Appeals specifically recognized the form of trial misconduct that Kawasaki was forced to endure. It included:

> Placing a tape recorder on counsel's table in such a position that discussions between Kawasaki's counsel and its representatives could be monitored; surreptitiously examining Kawasaki's files; and concealment of tapes on which actual speeches were recorded and which were exculpatory in character."

(Appendix A, page 2). Despite the recognition of such conduct, the court concluded, "The record does reveal a 'lack of professionalism,' as the ALJ characterized it, but it does not appear prejudice resulted." (Appendix A, pages 2-3).

Similarly, the court tried to distinguish any prejudice that resulted from the General Counsel's repeated failure to produce witness statements prior to cross-examination. Despite the repeated and be-

lated production of Jencks Act documents on nine separate occasions, the court concluded, "We agree with Kawasaki that a tardy production of a witness is not the equivalent of a timely production; . . . In this case the charge that there was prejudice is general . . . . In short, prejudice may be found only if it can be presumed." (Appendix A, pages 3-4).

When taken as a whole, the multiple acts of misconduct that Kawasaki was forced to endure cannot be said to constitute a fair trial lacking in any prejudice or amounting to merely harmless error. The repeated Jencks Act violations coupled with the other procedural improprieties clearly constitute sufficient grounds to rule that Kawasaki has been prejudiced and as such is entitled to a new trial.

This Court has previously recognized the importance of procedural due process in administrative hearings. *NLRB v. Indiana & Michigan Electric,* 317 U.S. 9 (1943); *Morgan v. United States,* 298 U.S. 468 (1936). In the *Indiana & Michigan Electric* case, the court dealt with allegations of procedural improprieties during the trial and stated as follows:

> The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed.

*Id.* at 22.

Similarly, in *Reilly v. Pinkers,* 338 U.S. 269 (1949), the Court recognized the importance of cross-examination in an administrative hearing, stating:

> It is also contended that the error in restricting cross-examination was harmless here because the memorandum of the factfinding official indicated that he had read the excluded materials and would have made the same adverse findings . . . . The error of this deprivation could not be cured by having the factfinder subsequently examine the material.

*Id.* at 277.

It is submitted that this Court has heretofore never been confronted with such a plethora of procedural violations and trial misconduct in an administrative hearing. Hence, it has not had to articulate at what point the prejudice can be said to have occurred. Kawasaki submits that due to the egregiousness of the violations in the instant case, it was prejudicial per se for the General Counsel to conduct an administrative proceeding in this manner.

The General Counsel attempted to tape record conversations and trial testimony, as well as examine Kawasaki's trial papers, all of which are in contravention of the attorney-client privilege. When coupled with the background of intentional Jencks Act violations that permeated the trial, it is not known what more has to be shown to establish that prejudice has occurred.

In *Lee v. United States,* 368 F.2d 834 (D.C. Cir. 1966), the Court recognized prejudice caused by both the destruction of Jencks Act documents and a delay between the offense and the arrest before concluding that the conviction of the defendant had to be reversed. In addition, the authorities set forth above repeatedly state that were the Jencks Act violations to occur against the background of other procedural

errors and misconduct, the defendant is prejudiced per se and the convictions cannot stand. A similar ruling is thus warranted in the instant case.

Kawasaki has thus shown that (1) two key witness affidavits were never produced; (2) nine other affidavits were not timely provided; (3) the General Counsel attempted to surreptitiously tape record portions of the hearing and other conversations; (4) the General Counsel examined Kawasaki's trial documents during the middle of Bennett's cross-examination; and (5) the General Counsel tried to conceal exculpatory evidence. Though these items individually may not constitute a finding of prejudice, they collectively constitute a case of undeniable trial misconduct and prejudice which should be reviewed by this Court.

## CONCLUSION

Based upon all of the foregoing, Kawasaki submits that its petition for certiorari should be granted.

KAWASAKI MOTORS CORPORATION

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DATED this 29th
day of October, 1982.

## APPENDIX A

**United States Court of Appeals**
**For The Ninth Circuit**

| | | |
|---|---|---|
| KAWASAKI MOTORS CORPORATION, U.S.A., | ) | No. 81-7647 |
| | ) | 81-7758 |
| Petitioner, | ) | |
| | ) | NLRB Case Nos. |
| | ) | 17-CA-8737 |
| vs. | ) | 17-CA-8854 |
| | ) | 17-CA-8936 |
| NATIONAL LABOR RELATIONS BOARD, | ) | 17-RC-8473 |
| | ) | |
| | ) | MEMORANDUM |
| Respondent. | ) | |
| | ) | |

On Petition for Review of an Order of the
National Labor Relations Board
Argued and submitted July 9, 1982

Before: GOODWIN and NELSON, Circuit Judges, and SMITH,* District Judge.

The petition for the review of, and the cross-application to enforce, orders of the National Labor Relations Board (NLRB) are the latest episodes in an ongoing dispute between International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and Kawasaki Motors Corporation, U.S.A. (Kawasaki) relative to the organization of the employees of Kawasaki at its plant in Lincoln, Nebraska.

The NLRB set aside an election in which the em-

*The Honorable Russell E. Smith, Senior United States District Judge, District of Montana, sitting by designation.

ployees of Kawasaki voted against union organization because Kawasaki, through its supervisors, had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (Act). 29 U.S.C. § 158(a)(1) and (3). The order also found that an employee, Bennett, had been illegally discharged because of his union activities in violation of Section 8(a)(1) and (3) of the Act.

Kawasaki contends that the evidence was insufficient to sustain the charge that Bennett had been illegally fired. The standard for review is stated in *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905, 908 (9th Cir. 1981), as follows: "We must enforce the Board's order if the Board correctly applied the law, and if the Board's findings of fact are supported by substantial evidence on the record viewed as a whole." Judged by that standard, the evidence in this case with respect to Bennett was sufficient.

Kawasaki does not contend that the evidence was insufficient to support the findings on the basis of which the election was invalidated. It does, however, claim that the entire proceeding was tainted by the misconduct of counsel' in these respects: Placing a tape recorder on counsel table in such a position that the discussions between Kawasaki's counsel and its representatives could be monitored; surreptitiously examining Kawasaki's files; and concealment of tapes on which actual speeches were recorded and which were exculpatory in character. The record reveals that the administrative law judge (ALJ) was keenly aware of all of the acts of counsel leading to these charges, and on some occasions rebuked counsel quite severely for them. The record does reveal a "lack of professionalism," as

the ALJ characterized it, but it does not appear that prejudice resulted. The NLRB, in review of the decision of the ALJ, noted each incident and specifically found that Kawasaki had not been prejudiced. Our review reveals no prejudice.

A more difficult problem is created by the failure of counsel to produce statements made by witnesses called by counsel at the close of their direct testimony, as required by § 102.118(b)(1) of the NLRB's regulations. 29 C.F.R. § 102.118(b)(1). Kawasaki made proper requests that the statements of NLRB's witnesses be provided, and was assured that they had been. That some statements had not been produced was in each instance discovered by Kawasaki, on cross-examination or otherwise. However, statements of two witnesses were mentioned by the witnesses during their cross-examination and were produced during cross-examination. As to the others, counsel did tardily furnish the statements and offered to produce the witnesses for further cross-examination. Kawasaki declined to cross-examine those witnesses.

We agree with Kawasaki that a tardy production of a witness is not the equivalent of a timely production; that a tardy production gives the party calling the witness a chance to discuss any discrepancies between the statements and the previously given testimony; and that cross-examination may be much more effective if the witness has no chance to prepare for it. In this case the charge that there was prejudice is general. In no instance is it shown that the general tenor of the statements was different or that there was some contrary statement of an isolated fact.[2] We have made an effort to compare the testi-

mony of those witnesses whose statements were produced after the initial cross-examination had been completed, and it appears in general that the statements are consistent with the testimony given and would not have afforded Kawasaki any substantial ammunition for impeachment. In short, prejudice may be found only if it can be presumed.

A different problem exists with respect to the witnesses Harm and Berg. They were initially examined by the NLRB in August of 1979. In November the hearing was recessed until January 23, 1980. Some time in December Kawasaki learned that after the adjournment Harm and Berg had given statements to the Department of Labor. Kawasaki made no effort to obtain the statements by subpoena or otherwise until the day the hearing was resumed. At that time Kawasaki called upon the NLRB to produce the statements. That was not done, and the ALJ refused to strike the testimony of Harm and Berg.

The NLRB held that Rule No. 102.118(b)(1) requires that the NLRB furnish statements given prior to the direct examination of the witness and not to those given after the examination. Kawasaki urges that the examination of the witness is not complete until the cross-examination has been completed and hence that the rule was violated in this case. Contrary to the opinion of the NLRB, we believe that the rule fairly interpreted would require that any statement in the possession of counsel at the time cross-examination commences be produced by the NLRB.

Although the statements were not in the possession of counsel at the time they were requested, they were in possession of the Department of Labor. Un-

der the ruling in *Harvey Aluminum v. NLRB,* 335 F.2d 749 (9th Cir. 1964), it is required that statements be produced both under Rule 102.118(b)(1) and because, as Judge Browning stated in *Harvey, Id.* at 753, "justice requires no less."

Still remaining, however, is the question of whether under the circumstances of this case it was within the discretion of the court to refuse to strike the testimony of Harm and Berg. The procedural differences between this case and *Harvey* are substantial and might require that the cases be distinguished. We do not decide whether, under the facts here, it was not within the discretion of the ALJ to deny Kawasaki's motion because in our opinion the error, if any, was harmless.

In *Harvey* the NLRB's findings were dependent on the credibility of three witnesses for the NLRB as against eight for Harvey Aluminum, and the statements of these three witnesses were what had been requested.

In this case the ALJ made meticulous findings. He analyzed the evidence as to each of twelve charges of violations of Section 8(a)(1) of the Act, and the discharge of Bennett and Clare.

We are not advised by Kawasaki as to the manner in which the testimony of any of the affected witnesses (those whose statements were not furnished or were tardily furnished) was related to any of the specific findings. The ALJ in his findings detailed the evidence upon which he relied and the credibility of the witnesses whose testimony was the basis for the findings. He dismissed two of the twelve charges. In five instances employees, not including any affected witnesses, testified as to threats by offi-

cials of Kawasaki. These witnesses were found credible, and the officials said to have made the statements were not called. In two instances the ALJ found that the witnesses, not including affected witnesses, called by the counsel were more credible than those called by Kawasaki. In one instance the finding depended on the credibility of the affected witness Berg, another on the credibility of the affected witness Harm, and in a third instance it is impossible to tell which witnesses were among what the ALJ charactered as "the number of employees who testified in this case." If, however, any findings dependent upon the testimony of any of the affected witnesses were set aside, still the conclusion reached that Kawasaki had been guilty of unfair labor practices would remain.

As to the requests for reinstatement, Bennett's was granted and Clare's denied. Again, the ALJ painstakingly detailed the evidence, and in Bennett's case the testimony of the affected witnesses was not mentioned in the findings of the ALJ.

By nothing we have said do we condone the conduct of counsel. Particularly where the NLRB is both prosecutor and judge it is incumbent on it not only to preserve an image of fairness, but to be fair as well.

The petition for review is denied, and the orders in Nos. 17-CA-8737, 17-CA-8854, 17-CA-8936, and 17-RC-8473 are affirmed and shall be enforced.

## FOOTNOTES

'(Page 2) Counsel for the General Counsel of the NLRB are referred to as "counsel."

[2](Page 3) A possible exception exists in the case of witness Clare. As to her the administrative law judge specifically found that she was not credible and denied her petition for reinstatement.

## APPENDIX B

**United States of America**

**Before the National Labor Relations Board**

KAWASAKI MOTORS CORPORATION, U.S.A.

AND

| | |
|---|---|
| INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) | Cases 17--CA--8737, 17--CA--8854, 17--CA--8936, and 17--RC--8473 |

### DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On January 29, 1981, Administrative Law Judge Frederick C. Herzog issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, the Union filed cross-exceptions, and the General Counsel and the Union filed answering briefs to Respondent's exceptions.

The National Labor Relations Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Admin-

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[1]Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

istrative Law Judge and to adopt his recommended Order.[3]

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The General Counsel has excepted to the Administrative Law Judge's finding that counsels for the General Counsel knowingly offered as an exhibit a document which was not a true copy. The General Counsel contends that, at the time the document in question was offered, counsels for the General Counsel had no knowledge that it was not a true copy. We find merit in the General Counsel's exception.

The record reveals that, during the Union's second election campaign, Respondent posted a notice dated April 10, 1979, regarding bomb threats. The General Counsel alleged that this notice violated Sec. 8(a)(1) of the National Labor Relations Act, as amended. During the hearing counsels for the General Counsel introduced and offered as an exhibit a copy of the notice through the testimony of Bruce Berg, who identified the copy as "the posting that went up." However, during *voir dire* examination by Respondent's counsel, Berg testified that the notice which Respondent had posted differed from the document he had identified in size, type, and heading. The Administrative Law Judge thereupon rejected the offer of the exhibit. Counsel for the General Counsel subpoenaed from Respondent a true copy of the notice, which was subsequently offered and received into evidence.

Nothing in the record indicates that counsels for the General Counsel had any knowledge prior to the *voir dire* examination of Berg that the copy of the notice which they offered into evidence was not a true copy. Further, upon discovery of this fact, counsels for the General Counsel acted promptly in obtaining and introducing into evidence a true copy of the notice, which differed only in collateral respects from the copy first offered. Under these circumstances, we find, contrary to the Administrative Law Judge, that counsels for the General Counsel did not knowingly offer an untrue copy of the notice into evidence.

[2]The Administrative Law Judge indicated in dicta that a discharge was unlawful if it were shown that the discharge was, in part, discriminatorily motivated. We expressly disavow this statement. See *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (1980).

[3]We find that the extraordinary remedies requested by the Union in its cross-exceptions are not warranted to remedy the

Respondent has excepted to the Administrative Law Judge's refusal to grant Respondent's motions for a mistrial based on the conduct of counsels for the General Counsel during the hearing. Specifically, Respondent objects to the use by counsels for the General Counsel of a tape recorder; their rifling through Respondent's papers; their knowingly offering as an exhibit a document which was not a true copy; their failure to pay their share of the cost of transcribing certain tapes offered into evidence; their failure to tender witnesses' affidavits to Respondent prior to Respondent's cross-examination; and their refusal to obtain affidavits given by two witnesses to the Department of Labor.

We find no merit in Respondent's exception. As discussed below, none of the conduct of counsels for the General Counsel resulted in prejudice to Respondent, and thus their conduct does not warrant a mistrial.

With regard to the use of a tape recorder, the rec-

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unfair labor practices found herein. Chairman Fanning agrees with his colleagues that the extraordinary remedies requested by the Union in its cross-exceptions, including imposition of a bargaining order, are not warranted here. In so finding, Chairman Fanning continues to adhere to his petition in *United Dairy Farmers Cooperative Association*, 242 NLRB 1026 (1979), wherein he stated that in certain extraordinary circumstances a bargaining order should be given even absent a card majority. Chairman Fanning believes, however, that the unfair labor practices found herein are not sufficiently extensive to support imposition of this extraordinary remedy. Member Zimmerman agrees with Chairman Fanning that, on any view of the applicable law, imposition of a bargaining order absent a card majority is not appropriate in the present case. Therefore Member Zimmerman finds it unnecessary to express a view on the bargaining order issue presented in *United Dairy*, in which he did not participate.

ord reveals that, prior to the calling of the first witness, counsels for the General Counsel placed a tape recorder on the table in front of them. Noticing the tape recorder, the Administrative Law Judge instructed counsels for the General Counsel to remove it. Counsels for the General Counsel requested permission to record the testimony of the first witness, but the Administrative Law Judge refused permission. There is no evidence that counsels for the General Counsel operated the tape recorder subsequently during the hearing in disregard of the Administrative Law Judge's instructions. Nor is there any evidence that counsels for the General Counsel intended to use the tape recorder for any purpose other than to record the testimony of the first witness. Under these circumstances, although counsels for the General Counsel injudiciously failed to seek permission from the Administrative Law Judge prior to commencement of the hearing for use of the tape recorder, we find that no prejudice resulted from this brief incident.

With regard to the rifling of Respondent's papers, the record reveals that at one point in the proceeding one of the counsels for the General Counsel walked behind Respondent's counsel table, allegedly to examine an exhibit that had been offered into evidence by Respondent. Respondent's counsel, who was at the entrance to the hearing room, immediately objected to this conduct. The Administrative Law Judge instructed counsel for the General Counsel to leave Respondent's counsel table, and counsel for the General Counsel complied. There was no evidence that counsel for the General Counsel's conduct was motivated by a desire to examine any of

Respondent's trial notes or other internal memoranda nor that counsel for the General Counsel in fact examined such documents. Thus, although counsel for the General Counsel displayed injudicious conduct, we find that this conduct did not result in prejudice to Respondent.

With regard to the offer of a document as an exhibit which was not a true copy, we find, as discussed in footnote 1, that counsels for the General Counsel had no knowledge prior to the offer of the document that it was not a true copy. Accordingly, as there was no misconduct on the part of counsels for the General Counsel in this regard, no prejudice resulted to Respondent.

With regard to the failure of the General Counsel to pay his share of the cost of transcribing certain tapes, the record reveals that on the third day of the hearing, during a colloquy between the parties and the Administrative Law Judge, the Administrative Law Judge learned for the first time that counsels for the General Counsel had in their possession tape recordings of speeches of various members of Respondent's management taped by employees. In view of the fact that there had been extensive prior testimony in the hearing regarding what Respondent's officials had said in those speeches, the Administrative Law Judge instructed counsels for the General Counsel that, if this corroborative evidence were not offered into evidence, the Administrative Law Judge might draw adverse inferences to the General Counsel's position. After a recess, counsels for the General Counsel offered into evidence eight of the nine tapes in their possession. The ninth tape was not offered by counsels for the General Counsel

because it did not relate to the unfair labor practices alleged; however, this tape was offered into evidence by the Union in support of its election objections. Noting that the tapes had to be authenticated before he could receive them into evidence, the Administrative Law Judge inquired as to whether counsels for the General Counsel intended to call witnesses for such purpose. Counsels for the General Counsel stated that they had no witnesses who could testify to the authenticity of the tapes.

Thereupon, in an off-the-record discussion, the parties decided to have duplicates of the tapes made, to send the originals to a sound studio to filter out the extraneous noises, and then to have transcripts made of the tapes. Counsels for the General Counsel indicated that the expense entailed in this procedure might prevent the General Counsel's agreement to it and called their superiors at the Regional Office to discuss the matter.

When the hearing resumed, counsels for the General Counsel indicated that the General Counsel would agree only to share in the expense of transcribing three of the eight tapes offered as General Counsel's exhibits because two of the remaining tapes did not relate to the unfair labor practices alleged and the other tapes, containing a speech the transcript of which had already been received into evidence, were unnecessary to transcribe. The Administrative Law Judge asked counsels for the General Counsel if their present position meant that they wished to withdraw their offer of certain tapes as General Counsel's exhibits, and counsels for the General Counsel responded that they were maintaining their offer of all eight tapes. The Administra-

tive Law Judge thereupon directed the parties to proceed with the authentication of the tapes and adjourned the proceedings to allow the parties the time necessary for such procedure. During the adjournment, the Regional Director withdrew an allegation of the complaint, rendering, from the viewpoint of counsels for the General Counsel, all of the tapes irrelevant as evidence. Consequently, counsels for the General Counsel notified Respondent and the Union that the General Counsel was unwilling to share in the costs of transcribing any of the tapes unless the parties had relied on his previous position. However, counsels for the General Counsel made no attempt to withdraw their offer of any of the tapes as General Counsel's exhibits. It appears that the General Counsel has refused to date to pay any portion of the transcription costs of the tapes.

In view of the fact that certain discussions between the parties regarding the tapes and the payment of transcription costs occurred off the record, we are unable to determine whether the General Counsel at any point expressly agreed to pay a portion of the transcription costs of all tapes and subsequently reneged on this agreement. However, in our opinion, such resolution is unnecessary. We find that, since the tapes were General Counsel's exhibits, the General Counsel was obligated to share in the transcription costs necessary for their authentication. The General Counsel voluntarily chose to offer the tapes into evidence rather than risk any adverse inferences drawn by the Administrative Law Judge, and he chose not to withdraw any or all of the tapes after a review of them convinced him that none of the tapes was relevant as evidence. Thus, it

appears that the General Counsel took the inconsistent position of wanting the tapes in evidence but not wanting to pay for their transcription, without which the tapes were useless and could not be received into evidence. We do not approve of the General Counsel's position in this matter. However, Respondent has failed to establish any prejudice resulting from this matter. Respondent also wanted the tapes in evidence and subpoenaed the tapes from the General Counsel, presumably for the purpose of introducing them into evidence if the General Counsel had not done so. Thus, the General Counsel's position in regard to the tapes in no way thwarted Respondent's desire to have the Administrative Law Judge consider this evidence or prevented a complete record. In any event, although the Administrative Law Judge did consider this evidence, he did not rely on anything contained in the tapes in making any of his findings and conclusions. Under these circumstances, the General Counsel's failure to pay his share of the transcription costs of the tapes did not result in any prejudice to Respondent's case.

With respect to the failure of counsels for the General Counsel to tender witnesses' affidavits to Respondent, the record reveals that, upon conclusion of the direct examination of each witness called by counsels for the General Counsel, Respondent's counsel requested all prior statements of the witness. On each occasion counsels for the General Counsel complied with this request but, as to six witnesses, it was discovered, after Respondent's cross-examination had begun or had been completed, that counsels for the General Counsel had additional statements in their possession. These additional

statements were promptly furnished to Respondent.

These actions constitute undisputed errors on the part of counsels for the General Counsel. However, Respondent failed to establish that the errors were prejudicial. The record reveals that the additional statements of two of the witnesses were discovered and furnished to Respondent while the witnesses were still on the stand, allowing Respondent to utilize the additional statements in its cross-examination. Further, the testimony of another witness whose additional statement was furnished to Respondent after his cross-examination had been concluded was totally discredited by the Administrative Law Judge. Moreover, there was no evidence of bad faith on the part of counsels for the General Counsel. In any event, pursuant to an order of the Administrative Law Judge, counsels for the General Counsel returned to the hearing for further cross-examination all witnesses who had testified subsequent to the first witness whose statements had not been timely furnished to Respondent. However, Respondent chose not to engage in any further cross-examination of any of these witnesses regarding their prior testimony. Under these circumstances, we find that the errors of counsels for the General Counsel in this regard were not prejudicial to Respondent. See *Carlisle Paper Box Company*, 168 NLRB 706 (1967), enfd. 398 F.2d 1 (3d Cir. 1968).

Finally, with respect to the General Counsel's refusal to obtain from the Department of Labor the affidavits of two witnesses, the record reveals that on December 17 or 18, 1979, during an adjournment of the hearing, Respondent's counsel learned that some employees had given statements to a Department of

Labor investigator at some time after November 29, 1979, the date of the last adjournment of the hearing. Respondent made no attempt to obtain these affidavits from the Department of Labor. Further, Respondent did not request the General Counsel to obtain these affidavits until the hearing resumed on January 23, 1980. Pursuant to agreement of the parties, the Union's counsel and counsels for the General Counsel questioned all employee witnesses to ascertain if they had given statements to other Federal agencies. Only Bruce Berg and Greg Harm, who had testified on August 14 and 15, 1979, indicated that they had given statements to a Department of Labor investigator at some time after the hearing journed in November 1979. Respondent thereupon requested the Administrative Law Judge to direct the General Counsel to contact the Department of Labor and obtain these statements. The Administrative Law Judge denied this request. We find no error in the Administrative Law Judge's ruling. The requirement that a witness' statements be furnished upon request to opposing counsel prior to cross-examination applies only to statements in existence at the time of the witness' testimony which relate to the subject matter of the testimony. National Labor Relations Board Rules and Regulations, Series 8, as amended, Sec. 102.118 (b)(1). As the statements of Berg and Harm were given to the Department of Labor subsequent to their testimony at the hearing, the General Counsel was under no obligation to furnish these statements to Respondent. Under these circumstances, we find that the Administrative Law Judge correctly denied Respondent's request that the General Counsel be directed to obtain these statements.

In sum, we find that Respondent was accorded a fair hearing and that the Administrative Law Judge correctly denied Respondent's motions for a mistrial.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Kawasaki Motors Corporation, U.S.A., Lincoln, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order,* except that the attached notice is substituted for that of the Administrative Law Judge.

## DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 17 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged

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* In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on backpay due based on the formula set forth therein.

in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[5] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).

Dated, Washington, D.C. August 3, 1981

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list,

## APPENDIX

### Notice to Employees

### Posted by Order of the
### National Labor Relations Board
### An Agency of the United States Government

After a hearing at which all sides had an opportunity to give evidence, the National Labor Relations Board has found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice to assure you of your rights under the law and to advise you of the actions we are required to take to remedy our violations of the Act.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT fire, lay off, or otherwise discriminate against any employee for engaging in union activities or giving aid or support to any labor organization.

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containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 17 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

WE WILL NOT threaten employees by advising them

- that they or others may be discharged
- that we might impose more onerous job duties
- that we might close or move our plant or any of its work
- that we may withhold promotions, job reviews, or benefits
- that selection of a union would be futile.

WE WILL NOT promise benefits to employees in order to persuade them to stop their union activities or support.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights set forth above, which are among those protected by the National Labor Relations Act.

WE WILL offer Dan Bennett immediate and full reinstatement to his former position of employment, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make Dan Bennett whole for any loss of pay he may have suffered as a result of our discrimination against him, with interest.

KAWASAKI MOTORS CORPORATION, U.S.A.

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Two Gateway Center, Room 616, Fourth at State, Kansas City, Kansas 66101, Telephone 816--374--4688.

## APPENDIX C

**United States of America**
**Before The National Labor Relations Board**
**Divison of Judges**
**Branch Office**
**San Francisco, California**

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|---|---|
| KAWASAKI MOTORS CORPORATION, U.S.A. | Cases |
| and | 17-CA-8737 |
| INTERNATIONAL UNION, | 17-CA-8854 |
| UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL | 17-CA-8936 |
| IMPLEMENT WORKERS OF | 17-RC-8473 |
| AMERICA (UAW) | |

*Louis H. Kelly, Esq.* and *Jack D. McCarthy, Esq.*,
of Kansas City, KS, for the
General Counsel.
*Katz, Friedman, Schur and Eagle,*
by *Irving M. Friedman, Esq.*,
of Chicago, IL, for the
Charging Party and Petitioner.
*Tate, Bruckner and Sykes,*
by *Charles E. Sykes, Esq.*,
*Terry E. Schroeder, Esq.*, and
*Arthur T. Carter, Esq.*,
of Lincoln, NB, for the Respondent.

### Decision

**Frederick C. Herzog, Administrative Law Judge**

### Statement of the Case

This case had its inception when the International Union, United Automobile, Aerospace and Agricul-

tural Implement Workers of America (UAW)[1] filed a petition for an election to be conducted by the National Labor Relations Board in a unit of production and maintenance employees at the Lincoln, Nebraska plant of Kawasaki Motors Corporation, U.S.A.[2] Pursuant to that petition in Case No. 17-RC-8473 and the ensuing decision and direction of election by the Regional Director for the 17th Region of the National Labor Relations Board, an election by secret ballot was conducted on June 2, 1978. However, on September 29, 1978, the Respondent agreed with the Regional Director to avoid and set aside the results of that election. Pursuant thereto and a supplemental decision on objections and order setting aside the election, which issued October 18, 1978, a rerun election by secret ballot was conducted on April 19, 1979. The tally of ballots showed that there were approximately 516 eligible voters, 207 of whom cast their votes in favor of, and 257 of whom cast their ballots against, representation by the Union. There were no void ballots and 28 ballots were challenged. Thereafter, on April 24, 1979, the Union filed timely objections to the conduct of the election. The Regional Director subsequently determined that certain complaint allegations, set forth below, encompassed, in part, acts and conduct set forth in the Union's objections numbered 2, 3, 4, 8, 12, 14, and 15; accordingly, he consolidated said complaints with these objections to the election. On July 13, 1979, the Board denied the request for review of the Regional Director's decision in this matter.

The complaints, issued by the Regional Director

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[1] Hereinafter referred to as the Union.

[2] Hereinafter referred to as the Respondent.

which relate to this case are summarized, as follows:

**Case No. 17-CA-8491**

On August 30, 1978, the Union filed a charge alleging that the Respondent violated Section 8(a)(1) and (2) of the Act by conduct preceding the June 2, 1978 election. On October 2, 1978, a complaint issued thereon, but alleging only violations of Section 8(a)(1). The Respondent's timely answer denied all wrongdoing. On October 17, 1978, the Respondent and the Regional Director entered into a unilateral informal settlement agreement, providing remedial action on the part of the Respondent for the alleged violations of Section 8(a)(1) of the Act, though further expressly providing that the Respondent did not admit having engaged in any violative conduct. On July 25, 1979, the Regional Director withdrew his approval for the settlement agreement, noting the pendency of the complaints in Cases Nos. 17-CA-8854 and 17-CA-8936, and his determination that there had not been substantial compliance with the terms of the settlement agreement. (While the settlement agreement was subsequently reinstated by the Regional Director, the circumstances of its reinstatement are best explained below.)

**Case No. 17-CA-8737**

On January 22, 1979, the Union filed the charge in Case No. 17-CA-8737 alleging that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee, Connie Clare, on August 24, 1978. On July 26, 1979, the Regional Director issued an order consolidating Cases Nos. 17-CA-8737 and 17-

CA-8491 in a complaint alleging violations of Section 8(a)(1) and (3) of the Act, including the discharge of Connie Clare on or about August 24, 1978, and the violation of the settlement agreement in Case No. 17-CA-8491 by conduct complained of in Cases Nos. 17-CA-8854 and 17-CA-8936. Also on July 26, the Regional Director further ordered the consolidation for hearing of the allegations and objections in Cases Nos. 17-CA-8491, 17-CA-8737, 17-CA-8854, 17-CA-8936 and 17-RC-8473.

On August 7, 1979, the Regional Director reconsidered his earlier withdrawal of his approval of the settlement agreement in Case No. 17-CA-8491, reinstated the settlement agreement, and ordered that Case No. 17-CA-8491 be severed from Cases Nos. 17-CA-8737, 17-CA-8854, 17-CA-8936 and 17-RC-8473. On August 8, 1979, the Regional Director amended his consolidated complaint in Case No. 17-CA-8737. The Respondent's answer to the complaint in Case No. 17-CA-8737 denied all wrongdoing.

**Case No. 17-CA-8854**

On March 26, 1979, the Union filed the charge in Case No. 17-CA-8854, alleging violations of Section 8(a)(1) of the Act by the Respondent in the course of the pre-election campaign for the rerun election. On April 26, 1979, the Regional Director issued a complaint based thereon. The Respondent's timely answer denied all wrongdoing.

**Case No. 17-CA-8936**

On April 26, 1979, the Union filed the charge in Case No. 17-CA-8936, alleging violations of Section 8(a)(1) and (3) of the Act, including the April 11,

1979 termination of employee Dan Bennett and the April 17, 1979 termination or refusal of full-time employment to employee Richard Hawkins. On June 7, 1979, the Regional Director issued a complaint in Case No. 17-CA-8936 alleging violations of Section 8(a)(1) and (3) of the Act, including the April 11, 1979 termination of the employment of Bennett. As previously noted, at that same time the Regional Director ordered that Cases Nos. 17-CA-8936 and 17-CA-8854 be consolidated and heard beginning August 14, 1979. On June 12, 1979, the Respondent filed its answer denying all wrongdoing.

## Summary

Pursuant to notice, the hearing herein began before me in Lincoln, Nebraska, on August 14, 1979 and continued on August 15 and 16, at which time it was adjourned until September 25, 1979 to allow the parties to have certain evidentiary material prepared for use during the trial of this case. The adjournment was requested by both counsel for the Respondent and counsel for the Union, and was not opposed by counsel for the General Counsel.

The hearing was resumed on September 25, 1979, and continued on September 26, 27 and 28, 1979. It was then adjourned.

The hearing resumed on November 27 and continued through November 28 and 29, 1979. At that time it was adjourned to allow consideration of questions relating to the conduct of counsel for the General Counsel.

On December 5, 1979, I issued an order allowing counsel for the General Counsel to participate fur-

ther in the hearing and scheduling the case's resumption for January 22, 1980.

Pursuant thereto, the hearing resumed on January 22, and was concluded on January 23 and 24. All parties filed briefs on or before March 31, and each such brief has been carefully considered.

Thereafter, on June 16, the General Counsel moved to correct the record in approximately 150 specific instances as well as in other general respects. My ruling on this motion, which was opposed in part by the Respondent, is set forth below.

All parties appeared at the hearing and were given full opportunity to participate, to adduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Based upon the record thus compiled, I make the following findings.

## Findings of Fact

### I. The Business of Respondent

The pleadings herein demonstrate that there is no dispute that the Respondent is a corporation and that it is engaged in the design, production, distribution and non-retail sale of motorcycles and other diversified recreational products at various facilities, including a facility located at Lincoln, Nebraska, with which this case is concerned. In the course and conduct of its operations within the State of Nebraska, the Respondent annually purchases goods and services having a value in excess of $50,000 directly from sources located outside the State of Nebraska. Accordingly, I find and conclude that the Respondent is an employer engaged in commerce

within the meaning of Section 2(2), (6) and (7) of the Act.

## II. The Labor Organization

The pleadings further demonstrate that no dispute existed, at any time material herein, with respect to the Union's status as a labor organization. Accordingly, I find and conclude that the Union is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

## III. The Respondent's Agents and Supervisors

By its various answers to the several complaints herein, the Respondent has admitted that the following named persons are supervisors and agents of the Respondent, acting on its behalf, within the meaning of Section 2(11) and (13) of the Act:

| | | |
|---|---|---|
| 1) | Dale Barkhurst[2] | Production Foreman; |
| 2) | Dennis Butt | Vice President; |
| 3) | Jack Calendar | Gas Tank Paint and Decal Foreman; |
| 4) | Roger DeBaere[2] | Supervisor; |
| 5) | Steve Eicher | General Foreman; |
| 6) | Gene Fisher[2] | Warehouse Manager; |
| 7) | Woody Guthrie[2] | Foreman, Jet Ski Department; |
| 8) | Max Hosack | Maintenance Foreman, 2nd Shift; |
| 9) | Chris Lloyd[2] | Assistant Personal Director; |
| 10) | Harold Long[2] | Supervisor, Wheels Department; |
| 11) | Howard Lyons[2] | Supervisor; |
| 12) | Mario Mendez[2] | Supervisor; |
| 13) | Tina Parmly | Paint & Black Line Departments Foreman; |
| 14) | Ron Polivka | Production Superintendent; |
| 15) | Allan Priest | Crating Foreman; |
| 16) | Robbie Robbins | Foreman; |
| 17) | Robert G. Summers[2] | Personnel Director; |

[2] The Respondent's various answers did not specifically deny or admit the allegations respecting these persons. Accordingly, I deem their status to have been admitted, as alleged.

| | |
|---|---|
| 18) Don Van De Walker | Production Foreman, Wheels Department; |
| 19) Arnie Weiss | Supervisor; |
| 20) Dick Weyers | Foreman, Finishing Department; |
| 21) Cliff Whisenhunt | Foreman, Bonding Department. |

## IV. The Motion to Correct the Record

As noted, the General Counsel has filed a motion requesting that I order the transcript to be corrected in more than 150 instances. Respondent has stated its opposition to portions of the General Counsel's motion.

I have reviewed the transcript and the requested corrections. The great majority of requested corrections relate to transcript errors which are plain and evident to any reader. Many other similar errors have been noted by me in this transcript but, since no motion has requested their correction, I make no findings with respect thereto.

However, I find merit in the General Counsel's motion in each instance where he has requested a correction, other than those set forth below. Even though a number of the requested corrections were opposed by the Respondent, I have granted the General Counsel's motion where the sense, spelling or usage of the word or phrase in question seems evident from the context in which it was used. And in any instance where the Respondent's opposition has been unsuccessful, I note my reason therefor below. Finally, in the several instances where no party has requested, or opposed, a correction, but which I have made *sua sponte*, I set forth my reason(s) below.

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[3] Supra.

| Page | Line | From | To | Ruling | Reason for Ruling |
|---|---|---|---|---|---|
| 11 | 12 | Board's | Board's Unga | Granted | Sense of usage is clear in transcript. |
| 23 | 25 | the | that | Granted | Sense of usage is clear in transcript. |
| 26 | 19 | impassable | impossible | Granted | Sense of usage is clear in transcript. |
| 234 | 15 | MR. _____ | MR. SYKES | Denied | Transcript already reads as requested. |
| 371 | 15 | MR. McCARTHY | MR. SYKES | Granted | Context shows who was speaking. |
| 371 | 17 | MR. McCARTHY | MR. SYKES | Granted | Context shows who was speaking. |
| 400 | 3 | No. 38 | No. 30 | Granted | Sense of context, and No. 38 is a medical report. |
| 431 | 21 | on | own | Granted | Spelling. |
| 450 | 15 | 12:35 | 12:55 | Granted | Context makes it clear what was said. |
| 557 | 20 | taking | taping | Granted | Spelling and sense derived from context. |
| 557 | 24 | taking | taping | Granted | Spelling and sense derived from context. |

| | | | | | |
|---|---|---|---|---|---|
| 649 | 4 | McCARTHY | SYKES | Granted | Sense derived from context. |
| 650 | 13 | existing defense | a shifting defense | Granted, | Sense derived from *sua sponte* context. |
| 650 | 16 | existing sexual | a shifting position | Granted, | Sense and *sua sponte* recollection. |
| 650 | 16 | existing sexual position | existing ——— | Denied | See above. |
| 929 | 6 | tapes, he | tapes if he | Granted | Sense derived from context. |
| 1294 | 1 | detracts | tracks | Granted | Spelling and sense derived from context. |
| 1317 | 4 | jobbed | robbed | Granted, | Recollection. *sua sponte* |
| 1347 | 3 | 1979 | 1978 | Granted | Squares with other references. |
| 1357 | 10 | a recording | a tape recorder | Denied | Recollection does not support. |
| 1458 | 10 | pirate | private | Granted | Recollection. |
| 1471 | 20 | 2.118 | 102.118 | Granted | Squares with context. |
| 1476 | 16 | 47 | 47 and 48 | Denied | Recollection does not support. |

| | | | | | |
|---|---|---|---|---|---|
| 1554 | 25 | McCARTHY | SYKES | Granted | Context shows who was speaking. |
| 1562 | 16 | McCARTHY | SYKES | Granted | Context shows who was speaking. |
| 1562 | 17 | States, no. | States. | Granted | Sense derived from context. |
| 1562 | Insert between lines 17 & 18 | MR. McCARTHY: | No. | Granted | Sense of context. |
| 1565 | 17 | this memorda | these memoranda | Granted | Sense derived from context and spelling. |
| 1577 | 2 | McCARTHY | SYKES | Granted | Context shows who was speaking. |
| 1579 | 20 | Report | Reporter | Denied | Transcript already reads as requested. |
| 1586 | 18 | voiding | avoiding | Granted | Spelling and sense derived from context. |
| 1597 | 2 | ther | their | Denied | "the" is the correct change rather than as requested. |

## V. The Alleged Violations of Section 8(a)(1)[4]

### (1)

**Allegations:** It is alleged that on March 23, 1979, Dick Weyers threatened an employee with plant closure if employees selected the Union as their representative (GC Exhibit 1(i), paragraph 5(a)), and threatened to impose more arduous work duties upon an employee because of that employee's union activities (GC Exhibit 1(i), paragraph 5(b)).

**Facts:** In mid or late March, 1979, according to employee Clover, Weyers held a meeting with the employees in his department. Clover recalled Weyers saying that if the Union got in at Kawasaki, and if the Union tried to get a contract like General Motors', the Respondent would not be able to afford it and would probably have to close the plant. She also recalled Weyers pointing at her, as she wore a button indicating allegiance to the Union, and saying that if he wished he could require her to sand mufflers, which she described as a "dirty job," that he could give her a hard time for smoking a cigarette or for going to the bathroom too often.

Weyers recalled the meeting, stating that he called it to tell employees of the election and to answer their questions to the extent permitted by law. However, he denied saying anything to Clover. He denied telling employees of possible closure of the plant, or that he said anything about employees' usage of the bathroom. He went on to recite his own personal preference for the job of sanding mufflers.

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[4] During the course of the trial, the General Counsel withdrew a portion of paragraph 5(a) and all of paragraph 5(f) in Case No. 17-CA-8936 (Tr. 672).

**Conclusion:** Clover was a more convincing witness than Weyers, who was nervous and vague. Clover's testimony is credited over that of Weyers in any instance of conflict, despite the failure of the General Counsel to corroborate Clover's testimony. It is concluded that Weyers' comments extended beyond the protections afforded free speech commentaries upon economic necessity and, as such, violated Section 8(a)(1) of the Act.

(2)

**Allegations:** It is alleged that Tina Parmly, on or about March 23, 1979, threatened an employee with plant closure (GC Exhibit 1(i), paragraph 5(a)), and threatened to withhold a promotion from an employee because of the employee's union activities (GC Exhibit 1(i), paragraph 5(c)), and threatened employees with the loss of their job reviews because of the employees' union activities (GC Exhibit 1(i), paragraph 5(d)), and on both March 18 and 23, 1979, threatened employees with the loss of unspecified benefits because of their union activities (GC Exhibit 1(i), paragraph 5(e)).

**Facts:** Employee Thiellen testified that on March 23, 1979, Parmly told him and other employees meeting in the cafeteria that the requests to upgrade their department's labor grade(s) were "hung up" because of the union election, that their plant was a "very severable arm" of the Respondent's company, and that the Respondent would take better care of the people than the Union.

Further, according to employee Leuty, Parmly conducted a meeting for employees at her desk in the finishing department early one morning in mid

to late March 1979. Leuty recalled Parmly stating that if the Union got in emloyees would have no voice regarding anything to do with their jobs, that they could either gain or lose benefits, and that there could be strikes which get "pretty ugly."

**Conclusion:** Thiellen demonstrated good and precise recollection while testifying, giving a strong impression of credibility. Leuty, while giving a good impression for veracity, seemed unsure of details and prone to testify in conclusionary terms. However, Parmly was not called as a witness by the Respondent to rebut any of the testimony of either Thiellen or Leuty. Accordingly, I conclude and find that both Thiellen and Leuty are to be credited, and thereby establish the accuracy of the allegations.

(3)

**Allegation:** It is alleged that on or about March 26 and March 28, 1979, Hosack threatened employees by stating that their efforts to select the Union as their collective-bargaining representative would prove to be a futility, and by telling them that the Respondent would close the plant if the Union were selected by the employees (GC Exhibit 1(n), paragraph 5(a) and 5(e), respectively).

**Facts:** According to employee Bennett, the Respondent held meetings of employees to introduce Butt,[5] the new vice-president, sometime during the time period of 2 months preceding the April 19, 1979

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[5] That Butt met with employees, to be introduced and speak in general terms about the efforts then underway to unionize the plant, is not in dispute. Nor is the fact that such meetings occurred around the end of March, thereby establishing the general time of the events described by Bennett.

election. Later during the day of the meeting which Bennett attended Hosack walked up to him while he was working and told him that he was showing how little he cared about the Respondent company by wearing a button indicating support for the Union. Bennett testified that Hosack told him that the plant was a mere "drop in the bucket" compared to the Respondent's facility in Japan, and that if the Union got in the Lincoln, Nebraska plant would be closed, in his opinion. Bennett recounted Hosack's statement that there would definitely be a strike if the Union secured representational rights. Bennett also recalled that he and Hosack argued the matter for some 2 to 3 hours.

Bennett next testified to a meeting conducted by Hosack approximately 2 weeks prior to the April 19 election, attended by himself, Hosack and four others. Bennett testified that Hosack told this small assemblage in his office that Butt, with whom he'd just met, would refuse to sign any contract with the Union, that the Respondent was losing money and that if the Union got in they would have to close down the plant. Hosack was said to have told them they'd definitely have to go on strike if the Union should get in, and to have advised them to go out and buy walking shoes, evidently to be used by them while picketing. Bennett testified that Hosack went on to say that the Respondent would probably just fire all of them because he understood that the Union would desire that apprentice mechanics possess better qualifications than theirs.

Bennett's testimony regarding this latter meeting with Hosack has not, in my opinion, been corroborated by Slossen, who testified that "approximately in the last half of March 1979" Hosack walked into

the cafeteria one night around 7:00 p.m. and reminded Slossen and other employees that they'd better have good shoes because they were destined to do a lot of walking, that the Respondent would not accept the Union, that the Respondent was losing money and might close the Lincoln, Nebraska facility, and that, even if the plant weren't closed, the Respondent would operate with supervisory personnel and hire a new complement of workers.

I have difficulty accepting such testimony as corroborative of Bennett's inasmuch as it places the meeting on a different date, at a different time of day, at a different location in the plant, and with different people present. And, if that were not sufficient to cause me to reject Slossen's "corroboration," I note that the testimony as to the substance of what was supposedly said by Hosack does not bear close analysis in an attempt to dovetail, or even reconcile, the two accounts.

However, I find that, even absent corroboration, Bennett's version of these statements by Hosack must be credited. First of all, Bennett was candid and forthright in demeanor while testifying. While he manifested some inability to recall each detail, such as dates, with precision, he was apparently testifying truthfully, without any attempt to mislead or enlarge. And, secondly, Hosack was not called by the Respondent to refute Bennett's testimony.

Respondent's counsel represented at the trial that Hosack became ill during one of the trial's adjournments and, generally speaking, that the nature of Hosack's illness prevented him from testifying accurately. Additionally, Respondent's counsel placed certain medical records into evidence purporting to

show that Hosack's failure to testify was caused by his illness, rather than any reluctance of the Respondent to call him as a witness.

The records, which are clearly hearsay, purport to demonstrate that Hosack suffered an acute illness, starting in early October 1979, that Hosack was hospitalized for approximately 2 weeks, and that his illness manifested itself as a neurological problem resulting in seizures.

In my opinion, the Respondent has thereby satisfied its obligation to demonstrate why I should not draw an unfavorable inference from its failure to call Hosack as a witness. And I draw no such inference here, despite the failure of the Respondent to produce expert medical testimony concerning Hosack's condition at the time of the trial.

However, no matter how one may sympathize with the Respondent's resultant inability to refute some of the testimony of the General Counsel's witness, neither is there any warrant for shifting the onus for the failure to produce Hosack to the General Counsel. Nor, I believe, is there any basis for failing to credit Bennett's testimony, which, for whatever reason, stands unrefuted and apparently worthy of belief.

Thus, I find that Hosack made the statements attributed to him by Bennett and that a number of such statements were violative of Section 8(a)(1) of the Act, despite Bennett's admission that he and Hosack "had an understanding" to tell one another exactly what they believed concerning the subject of unionism.

(4)

**Allegation:** It is alleged that Hosack threatened employees with adverse action, plant relocation or closure if they selected the Union (GC Exhibit 1(n), paragraph 5(c)).

**Facts:** Around April 4, 1979, Bennett happened to mention to three fellow employees that he'd purchased a motorcycle. Hosack was present, and stated words to the effect that he didn't understand how some people could undertake financial obligations, such as would be involved in purchasing a motorcycle, when they didn't know where their income was coming from.

**Conclusion:** For the reasons just stated, I have determined that Bennett's testimony must be credited. And, it needs much imagination to view Hosack's words as anything other than a thinly veiled threat to the economic welfare of Bennett, particularly when it is recalled that Bennett was soon thereafter illegally discharged.

(5)

**Allegation:** It is alleged that Calendar in mid-March and on March 27, 1979 threatened employees with plant closure if they selected the Union (GC Exhibit 1(i), paragraph 5(a)).

**Facts:** Thiellen testified that on Monday, March 26, 1979 around 6:05, near the supervisor's desk, and with employees Hicks and Stick within earshot, Calendar came up to him and said he had heard through employee Haverkamp that Thiellen had been saying that it was illegal for a plant to close because employees selected a union. Thiellen responded that it was illegal for a plant to close because of a union

election and that it was also illegal to threaten to do so. Thiellen testified that Calendar loudly rejoined, "This plant can close at any time for any reason. You don't know what you are talking about." This led them to begin arguing as to which knew more about the law governing such conduct. So, on the following day Thiellen brought a copy of a judicial opinion to work with him. He spoke to Calendar around noon near the black line section, with employee Schwarz nearby. According to Thiellen, upon being shown the opinion, Calendar stated that he had no quarrel with what it said, but that he was bothered by the fact that the Japanese could take over the entire Lincoln, Nebraska operation merely by using two unused production lines already in existence in Japan. When Schwarz asked why they didn't, Calendar said that the Lincoln plant was an experiment.

**Conclusion:** As previously noted, I found Thiellen's testimony to be quite credible. Thus I have no hesitance in finding and concluding that the facts occurred as he testified in the face of the Respondent's failure to call Calendar in an attempt to refute Thiellen's story. And, while I can appreciate the sense of "provocation" perhaps felt by certain of the Respondent's supervisors, there remains no excuse for any supervisor uttering so bald a threat as that contained in Calendar's statement that, "This plant can close at any time for any reason," or in Calendar's allusions to the ability of the Respondent to easily transfer the plant's work to Japan. Obviously, an employer may under certain circumstances, close a plant, or relocate a production facility, but the breadth of Calendar's statements detracts from any

attempt to color his words as lawful comments about lawful actions.

(6)

**Allegation:** It is alleged that on or about March 27, 1979, Don Van De Walker threatened employees with plant closure if they selected the Union to represent them (GC Exhibit 1(i), paragraph 5(a)).

**Facts:** Employee Schofield testified that on or about March 23, 1979, while in the plant's lunchroom around 9:30 a.m., accompanied by employees Harm, Esch and Keys, he started a conversation with Van De Walker by inquiring whether he'd advised employee Strough that if the Union got in the plant would move or close. Schofield testified that Van De Walker replied by saying that in his opinion it would. Harm then protested that a foreman had no right to tell employees the plant would close or move. At that, supervisor Green* rejoined that if they didn't like it there they could go to Russia.

Schofield's testimony about this incident was substantially corroborated by employee Harm's testimony. Employee Esch, though called as a witness by the General Counsel, was not asked about this conversation. Employee Keys, called as a witness by the Union, was not asked about this conversation.

Van De Walker testified that he'd responded to a question from Schofield about whether he'd threatened Strough by denying that he'd done so. He recalled that Harm and Green then loudly disputed a

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* Van De Walker had been seated with Supervisors Green, Janssen, Goodwin and Rable at the time that Schofield, Harm and others joined them, and Schofield put his question to Van De Walker.

point of law before the entire group dispersed.

**Conclusion:** Van De Walker exceeded the bounds of lawful commentary when he stated, without qualification other than the label of opinion, that the plant would move or close if the Union got in. Green's comment that employees who didn't like it, apparently referring to the Respondent's opposition to the employees' statutorily protected free choice, could go to Russia certainly did nothing but reinforce the coercive effect of Van De Walker's words, which I find to have violated Section 8(a)(1) of the Act.

(7)

**Allegation:** It is alleged that on or about April 17 Hosack promised benefits to employees in return for the employees dropping their support for the Union (GC Exhibit 1(n), paragraph 5(b)).

**Facts:** I have not found evidence to support this allegation. And neither the General Counsel nor any other party addressed it in their brief.

**Conclusion:** I therefore find and conclude that this allegation of the complaint should be dismissed as without merit.

(8)

**Allegation:** It is alleged that on or about April 10 Dennis Butt told employees that the Union was responsible for making bomb threats (GC Exhibit 1(n), paragraph 5(d)).

**Facts:** Employee Berg testified that he spoke to Butt on or about April 10. This conversation began near his work station and came about at Berg's request. Berg made his request to be allowed to speak

to Butt as a result of a notice posted upon the plant's bulletin boards. The notice recited that there had been two bomb threats at the plant, that such threats had caused the Respondent to suspend all activity in the plant and thereby waste time. In fact, on one occasion the plant had in fact been evacuated. The notice stated:

> I do not know whether the time of these threats is related to the upcoming election, but I do know that there is no past record of any such incident here at Kawasaki. I know also that the UAW has a record of occasionally inspiring certain individuals to take actions which are not always in the best interest of everyone involved. And I know lastly that the silence you hear upon returning to the plant after a bomb threat will become a permanent silence if we are to allow production to be continually interrupted.

The notice went on to state Butt's intention not to allow such threats to go unchallenged, and to seek the aid of employees in exposing whoever was responsible for the threats in order to insure that production continued without interruption.

Upon seeing such a notice, Berg asked his general foreman to arrange a meeting with Butt. This was done and at about 2:45 in the afternoon Butt and Summers came to Berg's work station. Butt and Berg sat down to talk. Berg stated that he felt this was a cheap shot and a low blow. He told Butt that he realized that the notice did not say specifically that the UAW was responsible but that he continued to feel that it implied that. Butt and Berg disagreed as to the meaning of the notice, even following a re-examination of it. Berg testified that during this re-

examination Butt told him "I do know that the UAW through past experience has inspired people to do things that they would not ordinarily so, such as pushing baby carriages with babies in front of moving cars to stop them from going into a plant or something." Berg stated that Butt then went on to say that he did not understand how anybody could gain the impression that he was trying to blame the UAW for the bomb threat. At one point, Berg turned and asked the employees who were gathered around him and Butt whether they interpreted the notice as he did. Employee Kuntz stepped forward and responded affirmatively. At that, Berg told Butt that that was all he had to say, thanked him for his time, and left.

Employee Kuntz also testified about this matter on behalf of the General Counsel. Her testimony however was quite vague and generalized, and it was quite apparent also that she simply had not been present to witness the events leading up to Berg's question which caused her to step forward and affirm that she believed that the notice amounted to a form of accusation. Nevertheless, I do believe that her testimony is corroborative of Berg's testimony to the extent that it indicates that she did respond affirmatively to the question he put to the gathered employees.

Butt, on the other hand, was not called by the Respondent to testify on this or other matters. Nor was Summers asked about this matter by the Respondent, though it was unclear just how much of this may have been overheard by Summers.

**Conclusion:** The fact that the notice was posted

is not in dispute. Nor is the language thereof.[7]

Nor is the testimony of Berg seriously contested, in the sense that any controverting testimony has been presented. For Butt was not called as a witness and Summers, though called, was not asked about this point. Thus, I credit Berg's testimony with respect to his conversation with Butt.

I confess that I am at a loss to understand precisely what the General Counsel is urging as a violation, that is whether he is urging that the language of the notice itself is violative or whether he is urging that the conversation with Butt contained some coercive content. In this latter respect, I note that considerable time was spent at the trial, including this very allegation, attempting to find out what evidence related to which allegation in the various complaints. On balance, from what the General Counsel had to say at the trial as well as what he stated in his brief, I am inclined to believe that he seeks a

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[7] The notice which the General Counsel originally placed in evidence (GC Exhibit 9) differs somewhat from that which was eventually demonstrated to be a true copy of the notice which was placed on the bulletin board (GC Exhibit 10). While the main body of the two notices is identical, I believed it improper for the General Counsel to have knowingly offered into evidence any exhibit differing from the true original. This is especially so where the offer is not accompanied by any explanation. Thus, while at this point the discrepancy between the exhibit offered and that which was, in fact, the true copy of the original varies only in collateral respects, I think it evident that the determination as to whether or not such a variance is sufficiently important to deprive opposing counsel of cross-examination rights must not be left to the counsel for any party. Instead, I believe that that question must properly be presented to the presiding administrative law judge. For that reason, I adhere to my view expressed, during the trial, that such conduct by the General Counsel impinges upon the hearing process.

finding of a violation based solely upon what was stated in the notice Butt posted, and not upon what Butt had to say while conversing with Berg.[4]

And, again on balance, I find that the Respondent's words reasonably conveyed the thought that the Union was responsible for making bomb threats, and that further disruptions of work would lead to plant closure or transfer of work from the plant to Japan or elsewhere. However, no evidence of link-

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[4] However, I am unsure about that latter point. Among the reasons for my uncertainty I note once more that the General Counsel filed several complaints with numerous allegations in them, that the evidence in this case was frequently difficult to tie up to the specific allegations being considered, and that the General Counsel was urged by me to issue a consolidated document so that every issue could be addressed at once, but he failed to heed the urging I gave him, and the trial itself was quite lengthy. Thus, the possibility for error clearly exists. In this latter connection, I have read the case cited by the General Counsel, *Medline Industries, Inc.*, 233 NLRB 627. I have failed to note any reference to either notices or bomb threats, the points for which I believe it was cited.

However, I must confess my inability to state this with certainty because of the brief filed by General Counsel which states at its conclusion: "Counsel for the General Counsel does not abandon any theory or complaint allegation simply because it has not been specifically argued herein." The General Counsel's theory may be that I have a duty to search the record and find whatever violations may be there, regardless of whether they were argued or relied upon at the trial, or even urged in the brief. I would agree to some extent, but not to the extent apparently desired here. This is especially so in a case where the trial was drawn out from August 1979 through the end of January 1980, where the General Counsel had opportunities to amend his pleadings to conform to the evidence (since counsel had copies of much of the transcript literally months before the trial was over) and the General Counsel failed to take advantage of those opportunities. Thus, when the General Counsel moved to conform the evidence to the pleadings, I did not hesitate to deny the motion, particularly in light of the fact that no specifics were pointed out.

age between such threats and the Union has ever been advanced.

Overwrought partisans of unions and employers can and often do use the technology of telephones to hide some overzealous, cowardly and dangerous act, such as making a bomb threat. But this can scarcely privilege an employer's threat to close or relocate its facility, at a time shortly preceding a representation election, for, proceeding solely upon conjecture and speculation, as the Respondent was doing, one might just as easily conclude that the alleged "threats" were fabricated by the Respondent in order to form a basis for refusing to deal with the Union. Obviously, neither form of speculation is warranted.

Nor does my finding and conclusion lead to the view that bomb threats must be suffered in silence. To the contrary, I would have no difficulty in dismissing this allegation had the unwarranted linkage of the threat to the Union not beem made, or if the threat of plant closure not been woven into the Respondent's notice.

Accordingly, I find and conclude that the Respondent violated Section 8(a)(1) of the Act as alleged.

**Allegation:** It is alleged that Van De Walker threatened employees on or about April 11 with plant closure if they selected the Union (GC Exhibit 1(i), paragraph 5(e)).

**Facts:** Following a mass meeting of day shift employees conducted by Butt on approximately April 11, employees Schofield and Kalmbrunn testified as to statements made to them by Van De Walker. According to Schofield, he saw Van De Walker leave a conversation with supervisor Rob-

bins and employee Kalmbrunn and come to his work station. When Van De Walker got there he told Schofield that he had heard that Schofield was spreading rumors through the plant about him, Van De Walker. Schofield responded that the only thing he had "spread" was that Van De Walker had told him that he (Van De Walker) had told employee Strough that the plant would move or close.

As Kalmbrunn remembered it, Van De Walker spoke to her after his meeting and then went over to Schofield. She followed him. She recalled Van De Walker telling Schofield that he had told employee Strough that the plant could move or close but that that was just his own opinion. According to Kalmbrunn, when Schofield responded, "I understand," Van De Walker reiterated that he had just come over to make sure that Schofield understood that what he had said to Strough was just his own opinion.

Van De Walker also recalled the incident. However, he stated that this occurred as a result of a request he had had from his superior to reassure Kalmbrunn that the plant would not be moved or closed and that he hadn't threatened anyone. As a consequence of this request, he approached her at work and told her that he wanted to assure her that he had never threatened anyone with closure of the plant.

As Van De Walker recalled it, Schofield was working to the right of Kalmbrunn and he heard him mutter something. So he walked over to Schofield and said that he (Van De Walker) was a known quantity and that Schofield must know that he was not the type to threaten anyone. However, he did

recall that Schofield stated that what he had been stating was his own opinion, at which point he recalled that he thanked Schofield and then walked away.

**Conclusion:** Schofield impressed me as a witness trying to be truthful. He had obvious difficulty in accurately relating the date of the conversation he had with Van De Walker, but not in a manner which would detract from his overall credibility. Kalmbrunn gave her testimony with composure, directness and apparent accuracy. Supervisor Van De Walker also appeared to be a truthful and believable witness; he did however exhibit a tendency to become defensive and to attempt to anticipate and parry attacks upon his testimony before they had even developed.

Thus, while the issue is close, I have determined to credit the testimony of Schofield and Kalmbrunn over that of Van De Walker in this instance, for the reasons set forth above. This leads me inevitably to conclude that Van De Walker had, indeed, uttered a threat of plant closure to employee Strough, and then repeated the essence of the threat to employees Schofield and Kalmbrunn. I find that this conduct violated Section 8(a)(1) of the Act.

**(10)**

**Allegation:** It is alleged that sometime during the week prior to April 11, supervisor Robbins threatened employees with closure of the plant if they selected the Union (GC Exhibit 1(n), paragraph 5(e)).

**Facts:** Kalmbrunn testified that in early April her supervisor, Robbins, spoke to her. Kalmbrunn

admitted that she brought up the subject and indicated her indecision about whether to be in favor of the Union or be against the Union. However, Kalmbrunn insisted that she did not ask Robbins his own opinion of unions and that Robbins simply went on and told her what he thought on his own volition. She recalled that he had told her that he once belonged to a union and felt that many times unions do more harm than good. She was specific in her recollection that he told her that the plant could close or that it might be moved if the Union were to be voted in.

**Conclusion:** As previously noted, Kalmbrunn's testimony has been found to be credible. Supervisor Robbins did not testify. Thus, I find that the conversation occurred as testified to by Kalmbrunn, and Robbins' gratuitous commentary was unprivileged threats of retaliation in violation of Section 8(a)(1) of the Act.

(11)

**Allegation:** It is alleged that on or about March 27 supervisor Whisenhunt threatened employees with plant closure if the employees selected the Union as their collective-bargaining representative (GC Exhibit 1(i), paragraph 5(a)).

**Facts:** Employee Goebel testified that on March 23, shortly after beginning work in the morning, supervisor Whisenhunt directed the employees in his department to go upstairs to the quality control conference room. Goebel stated that Whisenhunt talked to them, first qualifying his statements by saying that it was just his own personal opinion that he was expressing, that it would be possible that

Kawasaki would close their doors. Whisenhunt told the assembled employees that they did not have to listen to him and that his statements were his personal opinion and not the opinions of the management of Kawasaki.

Employee Harsh testified about attending the second meeting. However, according to Harsh, Whisenhunt started the meeting by stating that he firmly believed that if the UAW got in the plant's doors would be closed and the plant would be moved to Japan. He followed up by saying that Kawasaki could afford to move to Japan and questioning whether the individual employees could similarly afford it. However on cross-examination, she qualified her testimony by stating that he could have simply stated that he was telling the assembly his own beliefs and opinions.

**Conclusion:** This allegation stands unrebutted since supervisor Whisenhunt was not called as a witness by the Respondent. Nevertheless, in view of the inconsistency between the testimony of Goebel and Harsh, I have substantial questions with respect to their credibility. Goebel possessed a rather poor recall of facts, but he did seem to recall with some certainty the disclaimers entered by Whisenhunt. Harsh, on the other hand, seemed to exhibit partisanship in favor of the Union while testifying. That she was careless with words is demonstrated by the manner in which she was forced to modify her testimony while being cross-examined.

In light of the vagueness of the testimony of Goebel and my reluctance to credit Harsh, I have determined, despite the absence of rebutting testimony

by Whisenhunt, to reject the testimony of Goebel and Harsh on this point. Accordingly, this allegation of the complaint should be dismissed.

(12)

**Allegation:** It is alleged that on at least three occasions in late March and early April with the exact dates being unknown, Butt promised benefits to the Respondent's employees in order to dissuade them from continuing their support for or activities on behalf of the Union (GC Exhibit 1(n), paragraph 5(b)).

**Facts:** During the period proceding this election, various agents of the Respondent conducted numerous meetings with employees. As already noted, various supervisors and foremen conducted meetings within their own departments in addition to individual one-on-one discussions with employees. On still other occasions, employees were brought together in larger groups so that higher officials within the company could speak to them or even make slide presentations to them. Here, of course, the allegation relates to only one official of the company, Dennis Butt.

Butt was introduced to the employees at a meeting called for all first shift employees and conducted in the plant's front wheel assembly area on approximately March 28. At that time, a visit official from Japan, a Mr. Yamada, introduced Butt as the plant's new manager. My sense of this meeting, as well as others similar to it, conducted in order to make sure that he was introduced to all of the plant's employees, is that Butt stepped up in front of each assembly, told the employees that he was anxious to do well in his new position, and exhorted

employees to trust him and other Kawasaki officials, giving them fair opportunity to correct whatever mistakes had been made in the past.

And it is in connection with this reference to past mistakes that the difficulty asserts itself. For Butt told employees that he was aware that they were in th midst of a union election, but then went on to speak of the Respondent's past mistakes (presumably speaking particularly of his predecessor in his job) and to state that those mistakes would eventually be rectified. It also seems clear that he did not state specifically how those mistakes would be rectified except in one instance.

According to a number of employees who testified in this case, Butt, during the course of his talk to employees, held up for them to see a notice which had been posted in the plant by his predecessor in office. That notice had previously advised employees that due to President Carter's wage and price guidelines, employees would not receive their anticipated annual wage increase and would, instead, be limited to merit increases. In this regard, Butt proceeded to tell the employees that notice which he was holding up was one of the mistakes that he was referring to. With some apparent flair for the dramatic, Butt proceeded to tear up the notice in front of the employees, throw it into the assembled crowd before him, and declare that to be "what he thought of" the memo. Butt's presentation seemed uniformly to contain a disclaimer to the effect that he could not make employees any promises, but then, inconsistently, to assure them that things were going to change.

**Conclusion:** Butt's dramatic linkage of past mis-

takes to the repudiation of a policy which had the effect of preventing increases in wages can only be viewed as a veiled promise to increase wages, if only employees would "give him a chance." I find that the "chance" referred to was synonymous with rejection of the Union. As such, Butt conditioned the repudiation of a policy preventing employees from receiving wage increases upon the employees' rejection of the Union. I find and conclude that Butt thereby violated Section 8(a)(1) of the Act.

### VI. Case No. 17-RC-8473

The Union's objections to the election closely parallel the unfair labor practice issues raised by the consolidated complaints herein. Pursuant to findings heretofore made, I shall sustain objections 2, 3, 8 and 12 in view of my finding that during the critical pre-election period the Respondent, through its supervisors and agents, violated Section 8(a)(1) by promising benefits, by threats of plant closure, by threats to impose more arduous or onerous work duties, by threats to withhold benefits such as labor grades or job reviews or other unspecified benefits, by threatening that the employees' selection of a union would amount to no more than a futility, by threatening employees with plant closure or other adverse action including plant relocation if the Union were selected, by advising employees that the Union was responsible for making bomb threats at the plant, and by actually discharging a union supporter as a reprisal for having engaged in union activities. In my opinion, these unfair labor practices disrupted conditions enabling a free and uncoerced choice in the election.

On the other hand, I shall overrule objection 4 in-

asmuch as the evidence fails to support the allegation of interrogation, even insofar as it indicates that employees were forced to wear insignia or reveal their pro-union sentiments by their failure to do so. I shall overrule so much of objection 8 as pertains to the threat to bargain from scratch in the event the Union won the election, inasmuch as the evidence fails to convince me that such threats were made in a manner having a substantial impact upon the election. Likewise, I shall overrule objection 14, inasmuch as I do not believe that the unfair labor practices mentioned above, while serious and pervasive, amount to a "campaign of intimidation and fear" by threats of violence, strikes, or loss of jobs and customers. Similarly, I shall overrule objection 15 inasmuch as I believe that such a threat as was made by shutting down the plant's operations and advising employees that they should listen to the "sound of silence" created by the advent of the Union, with the implicit threat that the plant would become permanently silent is, in fact, embodied within objection 3 and will be remedied by my sustaining that objection.[9]

### VII. The Union's Request for a Bargaining Order

In considering the proper remedy in this case, the important question of whether or not to order that the Respondent bargain collectively with the Union is presented by the Union's motion that I issue such an order. The Union argues that the unfair labor practices committed by the Respondent herein are

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[9] No factual discussion of this threat is deemed necessary, as the Charging Party's Exhibit 1 demonstrates that Butt did, in fact, have the plant shut down briefly.

aggravated in nature, and have pervaded the election process to the extent that a fair election is unlikely to be held in the future.

Of course, such a bargaining requirement may be imposed under the authority of *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969). In that case, the Supreme Court plainly emphasized the law of this land to be that an employer which deliberately clogs the machinery of the statutory federal labor elections system cannot be heard to complain if its employees' representation desires are determined by less reliable means than a secret ballot election, such as their signed bargaining authorization credentials. And it does seem less than fair that an employer may thwart employees' free choice by engaging in unlawful conduct well calculated to coerce and intimidate, thereby undermining and eroding the Union's base for support. Additionally, the Union's base for support at the plant is eroded by the mere passage of time. In this case, the passage of time since the petition was filed herein now exceeds 2 years.

Of course in determining whether or not an employer's activities have so poisoned the atmosphere that the likelihood of a free and uncoerced rerun election may be held, one must take into account the seriousness of an employer's unfair labor practices. And it must be pointed out that the discharge of union adherents is among the most serious of unfair labor practices. Such unfair labor practices have been determined to form a valid basis for imposing a bargaining obligation. *N.L.R.B. v. Sitton Tank Company*, 467 F.2d 1371, 1372 (C.A. 8, 1972); *A.J. Krajewski Mfg. Co.*, 180 NLRB 1071 (1970). I have

found that the employer committed such activities here.

However, it must still be noted that a precondition to a *Gissel* bargaining order is that the union held a valid "card" majority in the bargaining unit. United Dairy Farmer's Cooperative, 242 NLRB No. 179, 101 LRRM 1278 (1979).[10]

Clearly, no such showing has been made in this case. Indeed, no such showing has even been attempted. While perhaps the dual eroding effects of the passage of time and the employer's unfair labor practices have, therefore, resulted in successfully thwarting the employees' legitimate desires for collective representation I have no alternative, in my opinion, but to deny the requested relief.

## VIII. The Discharge of Dan Bennett

### (1) General Statement

Dan Bennett was initially employed by the Respondent on February 7, 1977 and continued working there until April 10, 1979, at which time he was fired. He worked at several jobs while there. He began his last job for the Respondent in October 1978 when

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[10] I am mindful that the U.S. Court of Appeals for the Third Circuit recently remanded this case, after affirming the Board's findings of unfair labor practices, for reconsideration of the question of whether or not a bargaining order may be issued without a demonstration of majority support for the union. *United Dairy Farmers Cooperative Association v. N.L.R.B.*, ____ F.2d ____, 105 LRRM 3034 (C.A. 3, 1980).

However, in addition to significant differences between that case and this, I have no warrant for failing to follow the Board's precedent, even in cases where a true conflict appears between the Board and one or more Courts of Appeal. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963); *Peavey Company*, 249 NLRB No. 210 (1980).

he transferred to the maintenance department, under the direction of Max Hosack, working the 4:30 p.m. to 1:30 a.m. shift. Bennett was regarded as a good employee, and received three pay raises in the year or so preceding the discharge.

He was an adherent of the Union during both preelection campaigns conducted in 1978 and 1979. He signed an authorization card on behalf of the Union and wore both T-shirts and buttons asserting his allegiance to the Union. Additionally, in the campaign preceding the second election, he talked to approximately 50 fellow workers on behalf of the Union and passed out buttons for others to wear. He served as a member of the Union's organizing committee, and the button which he wore so identified him.

**(2) The Discharge**

On April 9, 1979, Hosack directed Bennett to do the job of preventive maintenance for a period of 1 week, as a fill-in for a vacationing fellow employee. This job required, so Bennett testified, that each machine in the plant be lubricated and inspected according to a monthly schedule, but with the work essentially being done at the employee's own pace, without close supervision.

Bennett began his last night of work at the Respondent at 5:00 p.m. He worked without incident until around 1:00 a.m. the next morning. At that time he pushed his equipment cart over to an area nearby the next two jobs on his list. When he got there he noted a Readers Digest magazine laying there. So he sat down on some aluminum rafters stored nearby and began to read "Laughter-The Best Medicine." Behind him was the degreaser,

and he was off in a corner of the plant. Bennett testified that he was not hiding or making any attempt to hide." He was about 10 to 12 feet from an aisleway, from which he could be clearly seen.

Bennett says he sat there only a short time, just long enough to read half a page, when Hosack walked up. Bennett said, jokingly, "You caught me sitting down." Hosack agreed and told him to punch his timecard out for the night. Bennett asked why and Hosack responded, "You are not supposed to be sitting down on the job." Bennett rejoined that he'd been working hard that night and was tired, so that he'd sat down for a rest while he read one page. Hosack repeated his direction to punch out and told Bennett he'd ask the personnel department to suspend Bennett for 3 days. Bennett said that he'd done no more than was common practice, and said that preventive maintenance was done at the employee's own pace so long as the scheduled goals of maintenance were met. Hosack replied that he'd never heard of anyone sitting down to read books. Their argument continued until Hosack told Bennett he was lucky not to be fired on the spot. Bennett was told to come back the next day after first calling Hosack. Bennett urged Hosack to check the records to see how much maintenance Bennett had performed that night, but Hosack refused.

Around 10:00 a.m., Hosack phoned Bennett and told him to report to Summers' office at 4:00 p.m.

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" Instead he vehemently asserted that such "breaks" were routine for maintenance employees, that many others engaged in like conduct without adverse consequences, even though some might do so for lengthy periods or, even in one case, for long enough to read a complete novel.

When Bennett arrived there, he was met by Hosack, Summers and Dave Fairbanks, Hosack's supervisor. Summers said that he'd heard Hosack's story and that he wanted to also hear Bennett's. Bennett exclaimed that he didn't understand what he'd done that was wrong, that he'd worked hard and that the records would bear him out. He also pointed out that he was a "really good employee," and had never been warned or reprimanded. Hosack interrupted to correct that he'd been warned to wear his safety glasses. Bennett agreed, but argued that had never been "a problem." Hosack also noted he'd been caught on a forklift truck. Bennett again agreed that he'd been caught, but noted that nothing had ever been said. He went on to tell them what happened the night before, and to reiterate that he had an excellent work record, telling them that he thought a 3 day suspension was totally unfair.

Bennett was then asked to wait outside the office. He did so for about 30 minutes. He was then called back and Summers told him he was being terminated because Hosack could no longer trust him. Bennett argued that he was trustworthy, and that, even if he weren't, the Respondent's own records would show that he worked hard and well. He asked to speak to Summers in private.[12] When the others had left he told Summers that Hosack had been a problem, not only for him but for others as well. He reiterated his good record for 3 years of work and asked to be reassigned anywhere in the plant. Summers refused, so Bennett gave up and left the plant, not to return.

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[12] At one point during the interview Bennett asserted that if it were not for the upcoming union election such drastic discipline would not have been considered. Summers responded that the Union had nothing to do with the action taken.

### (3) The Defense

The Respondent urges that, regardless of his reason, Bennett's reading break was unauthorized, and of a sort which he knew to be frowned upon by his supervisor. Additionally, the Respondent contends that Bennett's break was substantially longer in duration than depicted in his testimony, that it makes no sense to suppose that Bennett's union activities should have so suddenly proven unbearably repugnant to his superiors, and that neither the severity of the discipline imposed nor the failure or refusal of the Respondent to carefully investigate Bennett's alleged wrongdoing are of any legitimate concern to me in this decision.

### (4) Bennett's Discharge Was Unlawful

I conclude that the General Counsel has made out a *prima facie* showing sufficient to support the evidence that the Respondent discharged Bennett because of his union activity.[13] Bennett's sympathies and activities in support of the Union had been open and were admittedly well-known to the Respondent. The timing of the discharge cannot be ignored simply because the Respondent had been aware of his advocacy of the Union for a long time; instead, as has been shown by its activities in connection with the election campaign in the March-April 1979 time frame, the Respondent harbored a virulent hostility toward unionization. That hostility manifested itself with illegal threats that the plant would close, that it would move, that employees' jobs would be transferred to Japan, by threats to take benefits away

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[13] See *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB No. 150 (1980).

from employees, by promising benefits to employees if they rejected unionism, and by granting benefits in order to induce them to do so.

Thus, it begs the question for the Respondent to simply ask whether Bennett had engaged in misconduct, or to note that he might have properly been subjected to some form of discipline for having sat down to read a page from the Reader's Digest's section of "Laughter-The Best Medicine." Instead the proper question is whether or not the evidence demonstrates that were it not for his union activities he would have suffered the same fate, i.e. economic capital punishment. I find, on balance, that he would not and that his discharge was, therefore, discriminatory in nature.

The decision to fire Bennett was made by Summers following consultation with Hosack, Fairbanks and Butt. His decision, so he testified, was predicated solely upon Bennett's misconduct in sitting down to read a magazine the night before. Summers testified that Bennett's duties required that he perform them throughout the plant, and that he be alone, relatively "unsupervised," when doing so. But while Summers conceded that there were machines in the area where Bennett was "caught" by Hosack, he hedged his answer as to whether or not Bennett had, in fact, been performing maintenance duties upon them. In this respect, he lacked credibility, as he did when he testified that Bennett had told him, while making a plea for his job, that he'd intended to simply read a magazine for the remainder of his work shift when he was "caught" by Hosack, another 30 or 40 minutes.

In evaluating allegations of discriminatory con-

duct, the pivotal factor is motive. *NLRB v. Lipman Brothers, Inc., et al.*, 355 F.2d 15, 20 (C.A. 1, 1966). For, while it is true that an employer may discharge for a good reason, a bad reason, or no reason at all, it is also true that an employer may not discharge when the real motivating factor is to do what Section 8(a)(3) forbids. *Great Plains Beef Company*, 241 NLRB No. 150 (1979). And, further, while I must be careful not to substitute my own subjective judgment of what I would have done in the Respondent's position, *Grand Auto Inc. d/b/a Super Tire Stores*, 236 NLRB 877, footnote 1 (1978), and while I must acknowledge that simply because discipline may seem extreme it does not follow that the assigned reason for discharge was pretextual, *J. Ray McDermott & Co., Inc.*, 233 NLRB 946, 952 (1977), neither does it follow that simply because valid grounds for discipline may have existed that the termination was lawful. *N.L.R.B. v. Texas Independent Oil Company, Inc.*, 232 F.2d 447, 450 (C.A. 9, 1956). For an employer's motives may be mixed, and the effect is the same as if the illegal reason were the only operative reason. *Construction, Production & Maintenance Laborers' Union Local No. 383, etc. (William Pulice Concrete Construction)*, 236 NLRB 125 (1978); *N.L.R.B. v. Aver Lar Sanitarium*, 436 F.2d 45, 50 (CA. 9, 1970), and cases cited therein. An employer may not resort to even a valid reason for discipline as a means of building a case against an employee due to his union activities. *United Aircraft Corporation v. N.L.R.B.*, 440 F.2d 85, 92 (C.A. 2, 1971), or as a result of a campaign of "watchfully waiting for . . . . union enthusiasts to give the . . . slightest reason or pretext to get rid of them because of their union activities." *Lipman Brothers, Inc., supra*, 355 F.2d at 21.

Both the Board and the courts have held that "if the stated motive for a discharge is found to be false, it can be inferred that the motive is an unlawful one which the respondent desires to conceal, at least where the surrounding facts tend to reinforce that inference." *First National Bank of Pueblo*, 240 NLRB 184 (1979); *Shattuck Denn Mining Corporation v. N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9, 1966).

Moreover, if a supervisor, upon whose report an action is taken, was discriminatorily motivated in making such a report, there is no question but that the report must itself be considered the cause of the action, and that any resulting action must be regarded as discriminatory. *Bechtel Corporation*, 195 NLRB 1013, 1020 (1972). Thus, Fairbanks' testimony[4] that Hosack had assured Summers that no prior similar incidents were known cannot shield the Respondent.

In this case it appears that the sudden decline in the level of tolerance shown by Hosack, and the "untrustworthiness" shown by Bennett coincided with the peaking of both Bennett's union activities and the Employer's anti-union campaign. Such circumstances give rise to an inference that an employer's stated reason for discipline was false. See, for example, *All Brite Window Cleaning and Maintenance Services, Inc.*, 235 NLRB 596, 602 (1977); *The Youngstown Osteopathic Hospital Assoc.*, 224 NLRB 574 (1976); *Holiday Inn of America of San Bernardino*, 212 NLRB 280 (1974), enforced as modified 512 F.2d

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[4] Fairbanks' testimony lacked credibility. Despite repeated attempts to have him cease testifying in vague and conclusionary terms, he persisted. I am unable to believe his testimony on any point short of an admission.

1171 (C.A. 9, 1975); *Shasta Fiberglass Inc.*, 202 NLRB 341 (1973). And while, as noted earlier, I am not free to substitute my judgment for that of the Respondent, neither am I free to blind myself to the inferences which logically arise during an inquiry into the Respondent's motivation where the Respondent's actions seem atypical.

The fact that the Employer failed to heed Bennett's repeated pleas to simply look at his record to see how much he had done detracts from the Respondent's credibility in its assertion of a valid reason for discharge. Compare *Tama Meat Packing Co.*, 230 NLRB 116 (1977).

This conclusion seems doubly reasonable where a seasoned and good employee, such as Bennett, was summarily discharged, thereby apparently causing the Respondent to face the prospect of replacing him with someone unseasoned; in this connection I note that Bennett was already a replacement for a vacationing employee. Compare *N.L.R.B. v. Davidson Rubber Co.*, 305 F.2d 166, 169 (C.A. 1, 1962); *N.L.R.B. v. I.A.T.S.E. (Film Editors)*, 303 F.2d 513, 519 (C.A. 9, 1962), cert. denied 371 U.S. 826 (1962).

In sum, Bennett was apparently a vocal and active supporter of the Union. The Respondent was adamantly opposed to unionization and an election was soon to be held. When Bennett engaged in activity which arguably constituted misconduct, but which was clearly of a rather minor nature, similar to that which had been countenanced on many occasions previously,[15] he was summarily discharged while the

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[15] Bennett's testimony to this effect was credibly delivered. It is also noted that Hosack was not called to testify, to deny Bennett's testimony. And, as previously noted, I have not found

Respondent adamantly refused to consider or review its own records of how much work he had produced during the time in question."* I am persuaded that, on balance, had Bennett not been the strong union activist he was, and had the election not been imminent, Hosack's level of intolerance would not have been so substantially increased and Bennett would simply have been told to return to work, either when Hosack first saw him or as soon as he had completed his rest, and that, if any discipline at all had been meted out, it would have been no more than a mild rebuke." For while there is no quarreling with the Respondent's position that it must be able to maintain high standards of productivity, neither can it be gainsaid that the Respondent may not enforce such standards only against those who happen to be leading or ardent supporters of the Union.

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Hosack's medical condition sufficient to overcome credible evidence.

* It is not even clear that what Bennett did would amount to "misconduct"; for I am convinced by the evidence that maintenance workers must, by the very nature of their jobs, work at a pace motivated in large part by their self-discipline, which will satisfy an employer if the results demonstrate that the machinery has, in fact, been serviced properly. I do not believe that the Respondent could credibly contend that it requires each and every employee, including those working upon periodic maintenance activities, to behave in such a "nose to the grindstone" fashion that an employee may not legitimately take a short rest-break.

" For example, employee Slossen credibly testified, corroborating Bennett, that he and others were similarly "caught" by Hosack only days before Bennett was "caught." Yet Hosack merely caused them to return to work. There is no explanation readily apparent for the different level of tolerance extended to them and Bennett other than Bennett's leading role in the efforts to unionize.

Accordingly, I find and conclude that the Respondent's evidence is not sufficient to furnish an adequate defense to the General Counsel's *prima facie* case. Summers' testimony regarding the discharge of another maintenance employee, Sorrell, demonstrated the comparatively precipitous nature of the Respondent's action in firing Bennett, who was accused of no more than an offense against property. Sorrell, on the other hand, was accused of the much more serious conduct of threatening a supervisor. The General Counsel's documentary evidence, drawn from the Respondent's own files, shows that Sorrell was issued a series of written warnings, growing out of a series of incidents over a period of several months, some of which had the potential for violence.

From all that appears the Respondent had and used at least a rough form of progressive discipline when dealing with Sorrell, who was evidently not known as a union activist. Bennett, on the other hand, was quickly fired for a lesser offense, previously countenanced, despite Bennett's good record and in the face of his unavailing efforts to persuade the Respondent's officials to even look at its own records which Bennett contended would demonstrate that he'd been working diligently.

The disparate treatment thus demonstrated seems to have little possibility of explanation other than that contended by the General Counsel and the Charging Party, i.e. that Bennett was subjected to summary, harsh discipline because of a desire by the Respondent to rid itself of his union activism shortly before the election.

Accordingly, I find and conclude that Respondent

illegally discharged Bennett as alleged in violation of Section 8(a)(3) and (1) of the Act. It seems clear that, at the least, Bennett's break cannot be correctly characterized as unauthorized. Nor is it clear just how Bennett's "trustworthiness" could be legitimately impugned based on the evidence at hand. It seems more likely that Hosack's extreme reaction to Bennett's alleged misconduct was predicated upon his sense of "how little" Bennett cared for the company, as demonstrated by Bennett's wearing of a prounion badge or otherwise demonstrating a leadership capacity on behalf of the Union. Nor should Hosack's scarcely veiled warning, days before, that Bennett had been foolish to buy a motorcycle since he had no assurance of continued employment, be disregarded when considering Hosack's motivation. I conclude, therefore, that Hosack, and others, illegally, seized upon this incident in an attempt to manufacture "just cause" to discharge Bennett, in violation of Section 8(a)(1) and (3) of the Act.

## IX. The Discharge of Connie Clare

### (1) General Statement

Connie Clare began working for the Respondent in April 1977, eventually being assigned to a series of departments and jobs. She received a written warning in late 1977 or early 1978, calling upon her to improve her attendance, increase her production, and be more consistent in maintaining high standards of quality. Her job review was postponed for 30 days in order to give her an opportunity to improve her performance. She was specifically warned that her production should be improved by spending more time working and less in the bathroom or talking. Ultimately, however, she suc-

ceeded in earning a work review and a merit wage increase (although the Respondent contends that such an increase bore little or no relationship to true merit).

As the Union's initial organizational effort began, Clare became an open advocate of the Union. She joined the organizing committee,[8] signed an authorization card, and passed out other materials from the Union to other employees prior to the first election.

Clare's union sympathies were known to her superiors and, quite obviously, did not evoke their approval. On one occasion,[9] Priest walked up to her and inquired about the button she was wearing. She told him that it was a button to indicate that she was a member of the Union's organizational committee. He turned and walked away.

On another occasion, Priest told his employees in the crating department that they'd lose their benefits if the Union were elected. Clare, though not a member of his group, was seated nearby; Priest noted her presence by pointing his finger at her and inviting her to come over and speak to his employees if she had anything to say. The bell then rang and employees returned to work. But Priest then came up to Clare and asked privately why she favored the Union, after noting that the Respondent

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[8] Wearing a type of button which identified her as a member of the committee, as opposed to the majority of buttons which merely bespoke one's allegiance.

[9] These incidents are recited to demonstrate the Respondent's knowledge of and animus toward Clare's union sympathies and activities. There is no claim that violations of Section 8(a)(1) of the Act should be found on these bases, apparently since the evidence would be time barred for such a purpose.

could promise better benefits if the employees voted against the Union. Priest[20] then warned against any "union people fucking around with my people."[21]

### (2) The Discharge and the Warnings

Clare worked through the time of the June 2, 1978 election until June 22, 1978. At that time, so the Respondent claimed in her employment compensation proceeding, she was fired for poor attendance and violation of company policies. Her policy violations were said to include smoking in no smoking areas, leaving work early and sitting down on the job, "after being duly warned." However, it is undenied that she was not told she'd been fired until sometime in the latter part of August.

Clare had gone on maternity leave on June 29, 1978 and was scheduled to return to work on August 29, 1978. The Respondent contends that it determined to fire Clare in June, and delayed telling her of its plan not to allow her to return from her impending maternity leave out of concern for her medical well-being as the baby's birth approached.[22]

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[20] Clare's testimony about these incidents was undenied.

[21] I do not credit the quavering, biased and unlikely testimony of Moore that Summers told him, a supervisory trainee at the time, that Clare and other known union sympathizers would be "taken care of" after the election. Nor do I credit the biased and implausible testimony of Sargent, also a supervisory trainee, that Summers told him and others that union adherents were to remain employed "on borrowed time." In these respects, I credit the denials by Summers.

[22] It is noted that she asked for and secured an extension of her maternity leave pursuant to a telephone call of August 7 and another of August 17 to the Respondent. Her August 7 call noted to the Respondent that her child had been born. No mention of her termination was made to her at that time, however, or on either August 12 or 17, when she again phoned relative to the maternity leave extension.

A few days after the election, on June 7, 1978, Clare was given a written warning by Barkhurst and Polivka. This warning mentioned a series of incidents alleged to have occurred between April 24 and May 24, three consisting of poor or slow workmanship, two of failure to wear safety glasses, and one of using Barkhurst's chair to sit down while working on the assembly line. The warning additionally noted her frequent and extended trips to the bathroom, as well as the bad effect her performance was said to have upon the morale of fellow workers. Contrary to several assertions within the warning itself, Clare claimed never to have been warned about any of these matters, and refused to acknowledge receipt of the written warnings by signing it on its face.

On June 26, 1978 Clare received still another written reprimand which contained a warning of termination for failure to correct the matters set forth in the reprimand or if she violated any other standards set by the Respondent. This reprimand related to five incidents. Two of them related to the very day of her first warning, June 7; it was alleged in the reprimand that Priest had warned her on June 7 about the quality of her work, and that Priest had observed her failure to avoid talking and return to work promptly from the bathroom. One related to June 12 when she was alleged to have returned late from her break, and to have been smoking in a high risk area. On June 16 Clare was said to have left her shift several minutes early, spending the time in the bathroom, before "dashing" out to have her timecard punched. And finally, on June 22 Clare was said to have been smoking and idling near the end of her shift.

### (3) The Defense

In response to the allegations that Clare was both warned and discharged illegally, the Respondent contends that Clare's discharge was amply warranted by the incidents set forth above. It is further contended that the totality of such incidents points up the Respondent's justification in concluding that Clare should be regarded as a poor worker. And finally, as with all other allegations, the Respondent contends that if violations of the Act occurred, they have already been remedied.

### (4) Clare's Discharge and Warnings Were Lawful

Each of the parties has exhaustively tried and briefed the issues pertaining to Clare. She was shown to be a union loyalist, though I am unconvinced that a fair reading of the record will demonstrate that her union activities were greater, or more offensive to the Respondent, than those of many other employees. And the timing of her written warnings does cause some suspicion, coming as they did so soon after the initial election campaign. Such circumstances might easily lead one to infer that the Respondent "lay in wait" for Clare's smallest error, and amassed a record.[23]

Here however, I cannot conclude that the evidence supports the inference that Clare would not have been discharged had she not been engaged in union activities. For, despite the suspicious circumstances noted above, and despite my conclusion

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[23] Clare testified that she was not warned, or told that the incidents were serious. I do not credit her in this. Instead, I believe that she simply failed to comprehend the jeopardy presented to her continued employment.

stemming from other evidence in this case that the Respondent would have had little reluctance to violate the Act, I believe that Clare's work furnished the Respondent with ample cause for discipline. And I am unable to conclude that she would not have been disciplined, or that the discipline would not have taken the form of warnings and discharge, had she not been a union sympathizer and, to some extent, an activist.

I say all of this while mindful of the failure of the Respondent to produce such important witnesses as Priest and Barkhurst. I believe that I must infer from this failure that their testimony would have proven unfavorable to the Respondent's position had they testified.

But, having said all this, I am still unable to avoid the obvious truth that Clare's discriminatory treatment must be proven by credible evidence. For I find that the Respondent's inconsistencies are insufficient to do more than raise suspicions, rather than convince.

For Clare's testimony was itself replete with inconsistency or fabrication. As I watched her testify, I concluded, from both her demeanor and her testimonial inconsistency, that she has an ability to inwardly excuse any fault, to shift the blame to others, to prevaricate and to hedge her answers. In short, she impressed me as an unreliable witness, whose account of past wrongs must be drastically discounted.

With regard to virtually every incident mentioned in the warnings given her in June 1978, she testified that she had never been previously advised of any such deficiency in her work.

Yet she admitted on cross-examination that she already knew that she was on work time when she sat down to smoke in her regular department after returning from another area where she'd been "loaned" for the day. Thus, I fail to see how any alleged failure to warn her of adverse consequences could somehow make it all right for her to sit down and smoke, despite it being near the end of the workday.

She also admitted that Priest had, indeed, told her to return to work promptly, after she'd been using the restroom one day, when he observed her standing outside its door on the loading dock, either talking to or listening to a forklift driver named Muffley.

She also admitted that Priest had, on or about June 7, 1978, rebuked or instructed her on how to tape parts to mirrors. The fact that Priest's rebuke or instruction to her did not "register" with Clare as justified cannot detract from the fact that it was given, or from its evident contradiction of her testimony that she was not ever notified of these incidents' potential harm to her work record.

Similarly she recalled being late in returning from break on June 12, 1978. She excused it as being justified by her desire to seek out Barkhurst and talk over her maternity leave. But I believe she must surely have known that she could not return late from a break without, at the least, making prior arrangements with her supervisor to be given extra time to attend to such administrative matters.

Regarding the reprimand for failing to wear safety glasses, Clare's affidavit of September 12, 1978 contradicts her testimony about never having been previously warned. But again, she excused

this by noting that she'd never heard of anyone being "written up" for such an offense. While I would agree with her that such an offense seems trivial, I cannot agree with the interference she seems to advance, that the Respondent was not within its rights in demanding adherence to safety standards by its employees, even if they had been engaged in union activities.

Clare testified that she did not regularly go into the restroom to smoke before leaving work, and that she did so only on June 16, 1978. Yet in her September 12, 1978 affidavit, Clare claimed that she had been doing this almost every day that she worked there.

Clare sought to excuse the various inconsistencies between her testimony during the hearing and that which she had previously given in various affidavits to Board personnel and to an agent of the Charging Party. She did so by noting that she was so busy with caring for her children that she became confused while giving her affidavits. But while Clare impressed me as a sincere and earnest person, and while I have no reason to doubt her testimony to the effect that she became confused while giving affidavits, I cannot find these inconsistencies to be adequately justified or warranted. Indeed, much of what I have set forth above seems to corroborate her asserted state of "confusion." But, having observed her attempts to testify credibly, and to rehabilitate her earlier testimony, I am constrained to note that however sympathetically I may view her plight, I remain unable to attach much credence to her testimony as a whole. Instead, I can only observe that she seemed unable to testify consistently, or in a manner not patently self-serving.

Contrary to Clare's depiction of herself as a good and steady worker, willing to accept instruction and responsibility, the Respondent presented the testimony of a number of Clare's former co-workers. Maxine King's testimony was thoroughly credible and, in sum, depicted Clare as a worker who failed to carry her fair share of the workload, thereby causing a morale problem to develop, which eventually resulted, in April 1978, in several employees complaining about Clare's work habits to supervission. Her testimony was supported in many respects by that of Dorothy Anderson, who, while somewhat excitable as a witness, was also credible. Similarly, the testimony of Laverne Kumm, while somewhat lacking in details, was nonetheless believable.

I conclude that the General Counsel's evidence makes out a *prima facie* case that Clare's engagement in protected conduct was a motivating factor in the Respondent's decision to discharge her.[24] However, I also conclude that the General Counsel's case is quite weak and that Clare's deficiencies as a witness detract even further therefrom. While the Respondent's evidence[25] regarding its motivation in withholding the notice of her discharge from Clare, and even its basis for determining to discharge, seems suspiciously contrived, I have concluded that such evidence, whatever its infirmities, does demon-

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[24] See *Wright Line, Inc.*, 251 NLRB No. 150 (1980).

[25] In this connection, I specifically note that I was not favorably impressed with the Respondent's evidence regarding the timing of its announcement to Clare that a decision had been reached to terminate her; nor was I favorably impressed with the Respondent's apparent inability to consistently state the basis for its decision to discharge.

strate that Clare would have been warned and discharged even in the absence of her union activities. I therefore find that the Respondent did not violate the Act by discipling or discharging Clare in any manner alleged. I shall, accordingly, dismiss each allegation of wrongdoing by the Respondent relating to Connie Clare.

## X. The "Fashion Fair" Defense

I reject the Respondent's argument that no remedy is needed in this case. The essence of that argument stems from Board precedent[24] indicating the Board's approval of an employer's efforts to halt the effects of its own illegal activity. In the case of this particular Respondent, a panel majority of the Board, over the vigorous dissent of the Chairman, determined that a notice posted by the Respondent was sufficient to "expunge the ill effects normally incident to [illegal] activities" and, accordingly, dismissed certain allegations of a complaint.

While I applaud any efforts made by the Respondent to limit or halt the effects of its own wrongdoing. I must note my own doubts that the Board's pronouncements on the subject may be said to have ever risen to the level of a "doctrine," as characterized by the Respondent. Instead, each case cited by the Respondent, or which I have read independently, leads me to conclude that the Board has carefully avoided such a conclusion. It is my opinion that the thrust of such cases is to encourage attempts to cease or remedy wrongdoing but, all the same, to re-

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[24] *Fashion Fair, Inc.*, 150 NLRB 1435 (1966); see also, for example, *Kawasaki Motors Corporation, U.S.A.*, 231 NLRB 1151 (1977), involving this same facility.

serve the vindication of public rights to the Board itself.

In any event, there are substantial reasons to believe that the "doctrine" should not be applied in this case.

First of all, the "doctrine" has already been applied to this same Respondent. Yet, only a year or two later, it is observed that this Respondent engaged in numerous and serious unfair labor practices, and interfered unlawfully with the employees' free choice in a representation election.

Secondly, the very severity, breadth and variety of unfair labor practices committed by this Respondent seem to fatally detract from the good impact its disclaimers might have had to dispel any lingering coercive effects among its employees. In short, I know of no valid reason many employees, either witnesses to or victims of unlawful action by the Respondent, might have for trusting the words of the Respondent regarding its intentions to refrain from illegal activities in the future.

Thirdly, the "disclaimers" were very general in their language. This defect might not be viewed as being of great moment had the disclaimers not also so vigorously protested the Respondent's innocence of all wrongdoing.

And finally, I believe that a remedy is needed for the Respondent's flagrant interference with the free choice of the electorate, regardless of what the assurances against future wrongdoing might have been. Similarly, I have determined that employee Bennett is entitled to reinstatement and backpay. The Respondent's notices to employees fail to make provision for any of these needed remedies.

## XI. Procedural and Evidentiary Matters

In the course of this trial a number of motions were addressed to me. In most instances, I ruled upon them at the trial; often rulings were reserved; in still other instances, motions were renewed after my ruling.

Included among the motions were those of the General Counsel that I recind or modify the views expressed as findings in my letter-order dated December 5, 1979 (GC Exhibit 1(ii)), that I strike the testimony of certain witnesses for having violated the rule of sequestration, and that I allow the General Counsel's pleadings to be conformed to the proof offered in this case.

Also included are the Respondent's motions that I strike certain testimony because of the General Counsel's failure to provide the Respondent with copies of affidavits, and the Respondent's motion for a mistrial, essentially based upon the same conduct.

Having now reviewed the record, I have determined to overrule all outstanding motions by any party. I do so because of my belief that the record adequately explains and supports each ruling I made during the trial, as well as this ruling dealing with all remaining motions. The record seems adequate to enable any party aggrieved by my rulings to secure proper review thereof.

However, I grant the General Counsel's post-trial motion to amend its brief to me by substitution of a new page which corrects the inadvertent typographical omission of one line.

## The Remedy

Having found that the Respondent has engaged in

certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Dan Bennett, I find it necessary that the Respondent be ordered to reinstate him to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges, dismissing, if necessary, anyone who may have been hired to perform the work which he was performing at the time of his severance on April 10, 1979. Additionally, the Respondent will be ordered to make Dan Bennett whole for any loss of earnings he may have suffered by reason of his unlawful termination. Backpay is to be computed in the manner prescribed in *F.W. Woolworth Company*, 90 NLRB 289 (1950) and *Florida Steel Corporation*, 231 NLRB 651 (1977).[27]

**The Objections**

Having found that the employer engaged in preelection misconduct interfering with the laboratory conditions required for a free and uncoerced choice on the question of representation, I shall recommend that the election of April 18, 1979 be set aside and that a rerun election be conducted at such time as the Regional Director for Region 17 deems appropriate.

**Conclusions of Law**

1. The Respondent is an employer within the

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[27] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). See also *Olympic Medical Corporation*, 250 NLRB No. 11 (1980).

meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Dan Bennett on or about April 10, 1979 because of Bennett's support for and activity on behalf of the Union the Respondent has violated Section 8(a)(3) and (1) of the Act.

4. By promising benefits to employees in order to persuade them to stop supporting the Union, and by threatening to discharge, to impose more onerous job duties, to close or move the plant or any of its work, to withhold promotions, job reviews or benefits, or to make employees' selection of a union futile, the Respondent violated Section 8(a)(1) of the Act.

5. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not engaged in unfair labor practices other than those specifically found herein.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

**Order**[21]

The Respondent, Kawasaki Motors Corporation, U.S.A., Lincoln, Nebraska, its officers, agents, successors and assigns, shall:

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[21] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and

1. Cease and desist from:

(a) Discharging, laying off, or otherwise discriminating against employees in regard to hire or tenure of employment because of their activities on behalf of a labor organization or for engaging in any activity protected by Section 7 of the Act.

(b) Threatening employees with discharge or other reprisals because of their activities on behalf of or support for International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, or any other labor organization.

(c) Promising benefits to employees in order to persuade them to stop their activities on behalf of or sympathies in favor of a labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Dan Bennett immediate and full reinstatement to his former, or substantially equivalent position of employment if his former position of employment no longer exists, without prejudice to his seniority or other rights and privileges, and make him whole for lost earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copy-

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Regulations, be adopted by the Board and becomes its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ing, all personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its Lincoln, Nebraska facility copies of the attached notice marked "Appendix."[29] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the representation election conducted on April 19, 1979 in Case No. 17-RC-8473 be, and the same hereby is, set aside, and that Case No. 17-RC-8473 be, and the same hereby is, remanded to the Regional Director for Region 17 for the purpose of conducting a new election.

Dated: January 29, 1981.

Frederick C. Herzog
Administrative Law Judge

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[29] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Best Copy Available



APPENDIX

FORM NLRB-4727 (5-47)

30-(SF)-20-81

# NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

### AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing in which all sides had the opportunity to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice to ensure you of your rights under the law and to advise you of the actions we are required to take to remedy our violations of the Act.

The Act gives employees these rights:

To engage in self-organization; *
To form, join, or assist any union;
To bargain collectively through representatives of their own choice;
To engage in activities together for the purpose of mutual aid or protection or collective bargaining;
To refrain from the exercise of any or all such activities.

WE WILL NOT fire or otherwise discriminate against any employee for engaging in union activities or giving aid or support to any labor organization.

WE WILL NOT threaten employees by advising them
--that they or others may be discharged,
--that we might impose more onerous job duties,
--that we might close or move our plant or any of its work,
--that we may withhold promotions, job reviews or benefits, or
--that selection of a union would be futile.

WE WILL NOT promise benefits to employees in order to persuade them to stop their union activities or support.

WE WILL NOT in any like or related manner interfere with your rights set forth above, which are among those protected by the National Labor Relations Act.

WE WILL offer Dan Bennett immediate and full reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make Dan Bennett whole for any loss of pay he may have suffered as a result of our discrimination against him, with interest.

KANSAS RIVERS CONVENTING, U.S.A.
(Employer)

Dated _____ By _____
(Representative) (Title)

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**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, The Gateway Center, Suite 614, Fourth at State, Kansas City, Kansas 66101 Telephone: (816) 374-5151

Office-Supreme Court, U.S.
FILED
JAN 26 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-759

# In the Supreme Court of the United States

OCTOBER TERM, 1982

KAWASAKI MOTORS CORPORATION, PETITIONER
*v.*
NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly determined that petitioner was not prejudiced by the failure of attorneys for the General Counsel to produce certain prior statements of six witnesses at the conclusion of their direct testimony or by other acts of alleged misconduct by these attorneys at the hearing based upon which petitioner was determined to have committed unfair labor practices.

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# In the Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-759

KAWASAKI MOTORS CORPORATION, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1 to A7) is reported at 691 F.2d 507 (table). The Board's decision and order (Pet. App. B1 to B15) and the decision and order of the administative law judge (Pet. App. C1 to C63) are reported at 257 N.L.R.B. 502.

### JURISDICTION

The decision of the court of appeals was issued on September 14, 1982. The petition for writ of certiorari was filed on October 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTE AND RULES INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.* and of the Board's Rules and Regulations are set out at pages 2-3 and 7-8 of the petition.

## STATEMENT

### A. The Board Proceeding

Petitioner manufactures motorcycles and recreational products at a plant located in Lincoln, Nebraska. In 1978, the International Union, United Automobile, Aerospace and Agricultural Implement Workers ("the Union") sought to qualify as representative of a unit of petitioner's production and maintenance employees and filed a petition for a representational election. An election was held in 1978. Its results were set aside, and a second election was held in April 1979. The Union lost the election and subsequently filed objections to the conduct of the election and unfair labor practice charges with the Board, complaining of violations of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), in the month preceding the 1979 election (Pet. App. C1 to C2).

Following a hearing on the General Counsel's complaint, the administrative law judge ("ALJ") found that petitioner had engaged in unfair labor practices of "severity, breadth and variety," including repeated threats, promises of benefits, and the discharge of a known union supporter because of his activity during the election campaigns (Pet. App. C12 to C33, C57). The Board affirmed the administrative law judge's findings and ordered petitioner to cease and desist from the unfair labor practices found and to make whole the discharged employee for his losses (Pet. App. B11 to B12).

The questions presented by the petition pertain exclusively to certain alleged procedural irregularities during the administrative hearing. The underlying facts and the Board's rulings relevant to these matters are as follows:

1. The Board's rules and regulations require the administrative law judge, at the conclusion of the General Counsel's direct examination of a witness, to order for the use of

opposing counsel during cross-examination, upon request, the production of any statement of the witness in the government's possession that relates to the subject matter of his testimony. 29 C.F.R. 102.118(b)(1).

At the hearing, which commenced in August 1979, the attorneys for the General Counsel produced the statements of all witnesses as directed by the ALJ, but later discovered in their files additional statements of six witnesses, which had not been produced as required at the close of direct examination. Upon locating these statements, the General Counsel's attorneys promptly turned them over to petitioner's counsel (Tr. 591, 1254, 1298).[1] Two witnesses, Clare and Flores, were still subject to cross-examination when the additional statements were produced and they were subsequently examined by petitioner's counsel regarding the statements (Tr. 591, 597-598, 607, 613-616; R. Ex. 11; Tr. 1250-1251, 1254, 1276-1277; G.C. Ex. 43 and 45). Four witnesses, Moore, Esch, Berg and Harm, had finished testifying when the additional statements were produced, and were made available in November 1979 and January 1980 for the purpose of cross-examination regarding their statements (Tr. 1301, 1327-1332; G.C. Ex. 45; Ct. Ex. 8-11). Petitioner's counsel declined, however, to engage in such cross-examination (Tr. 1430). The statements of these four witnesses did not differ, either in general tenor or in specific factual particulars, from their prior hearing testimony (Pet. App. A3 to A4; Tr. 103-130, 168-183, 277-299; Ct. Ex. 8-11).

Meanwhile, in December 1979, during an adjournment of the Board hearing after they had testified (Tr. 103, 168), witnesses Berg and Harm gave formal statements to a

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[1] "Tr." denotes the transcript of testimony. "G.C. Ex.," "R. Ex.," "Ch. P. Ex.," and "Ct. Ex." denote respectively the hearing exhibits of General Counsel, the Company (the respondent before the Board), the Union (the charging party before the Board), and the ALJ.

Department of Labor investigator regarding events at Kawasaki (Tr. 1417).[2] The General Counsel's attorneys did not possess copies of the Department of Labor statements and did not know of their existence until the Board hearing resumed on January 23, 1980 (Tr. 1410-1411, 1452).[3] At that time petitioner's counsel, who had learned of the statements in December, asked that the General Counsel's attorneys be directed to obtain these statements from the Department of Labor and to produce them for use during further cross-examination of Harm and Berg (Tr. 1418, 1423). The ALJ denied this request, and declined to strike the previous testimony of Harm and Berg (Pet. App. C58; Tr. 1432-1435, 1437). Petitioner's counsel did not attempt to subpoena these statements (Tr. 1411, 1437-1438).

The ALJ denied petitioner's motion for a mistrial based upon improper production of witness statements on the ground that no prejudice had resulted from the omissions of the General Counsel (Pet. App. C58, Tr. 1311, 1432-1438). The ALJ made numerous detailed findings of unfair labor practice violations by petitioner, and did not, in any instance, rely exclusively on the testimony of witnesses

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[2]Petitioner correctly observes (Pet. 8) that the contents of the Department of Labor statements are not described in the present record (Tr. 1417-1418). The administrative law judge indicated to petitioner's counsel that he could subpoena these statements and introduce them in evidence if he wished them to appear in the record (Tr. 1437-1438). Petitioner did not subpoena them.

[3]Petitioner incorrectly asserts (Pet. 8) that the General Counsel "acknowledged the existence and its possession of these Department of Labor affidavits, but intentionally refused to produce them." The record reveals that the General Counsel's attorneys had no knowledge of these statements before learning of them from petitioner's counsel, and at no time had possession of them; and that the administrative law judge refused to order their production at the hearing (Tr. 1410-1411, 1452, 1432-1435).

Clare, Flores, Moore, Esch, Berg, or Harm in finding these violations (Pet. App. A5 to A6, C12 to C56).[4] In at least five instances the ALJ found Section 8(a)(1) violations entirely independently of the testimony of these witnesses (Pet. App. C12 to C20, C26 to C29). The affected witnesses testified to background matters peripherally related to the Section 8(a)(3) allegation regarding employee Bennett, but the administrative law judge did not refer to their testimony in making findings respecting this violation (Pet. App. A6, C36 to C47).

The Board rebuked the General Counsel's attorneys for committing "undisputed errors" in their handling of the witness affidavits contained in the General Counsel's files. However, the Board affirmed the ALJ's finding that the untimely production of witness statements was adequately cured by the offer of further cross-examination and did not result in any prejudice to petitioner's case (Pet. App. B9). The Board also sustained the ALJ's refusal to direct the General Counsel to obtain the Department of Labor affidavits (Pet. App. B9 to B10).

2. Petitioner also alleges that General Counsel's attorneys engaged in improper conduct during the hearing by examining documents on petitioner's counsel's table, surreptitiously attempting to tape record the testimony of a

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[4]Witness Moore had testified exclusively to events surrounding the discharge of witness Clare (Tr. 114-130). The administrative law judge discredited witness Clare and dismissed the allegation concerning her discharge (Pet. App. C47 to C56). Witness Flores, a union representative, did not testify regarding any unfair labor practices (Tr. 1246-1283). Witness Esch's testimony was partly stricken (Tr. 296), and was otherwise corroborative of the credited testimony of other witnesses for one violation (Tr. 93-94, 242-244, 263-265, 274-277). Witness Berg's testimony (Tr. 103-114) was also corroborative of other witnesses (Pet. App. C31 to C32) and was relied on for one violation (Pet. App. C21 to C26). Witness Harm's testimony (Tr. 168-183) was relied on for one violation and supported another (Pet. App. C20 to C21, C34 n.9).

witness called by the General Counsel, and purportedly attempting to conceal exculpatory evidence. The pertinent facts are as follows:

On one occasion during the hearing the General Counsel's trial attorney walked over to petitioner's counsel table to examine an exhibit that had been offered in evidence by petitioner without first being shown to the attorney for the General Counsel. Petitioner's attorney was near the door of the hearing room at the time and immediately objected; the administrative law judge instructed the General Counsel's trial attorney to leave the counsel table, and he complied (Tr. 486-487).[5]

During the hearing, before calling their first witness, the General Counsel's trial attorneys placed a tape recorder on the counsel table in front of them. The administrative law judge noticed it and instructed them to remove it. The General Counsel's attorneys then asked permission to record the testimony of their witness, but permission was refused (Tr. 32-34). They removed the tape recorder and did not subsequently operate it during the hearing (Tr. 34, 1357, 1359).

On the third day of the hearing the administrative law judge learned that the General Counsel's attorneys possessed tape recordings of various pre-election speeches by Company supervisors, one of which, by Company Supervisor Weise, had been alleged to constitute unlawful conduct. The tape recordings had been made informally by employees who attended the meetings. They could not be authenticated, and were nearly unintelligible (Tr. 349, 351-352, 356,

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[5]Contrary to petitioner's statement (Pet. 10), there is no record evidence that the General Counsel's attorney examined, or attempted to examine, petitioner's counsel's notes during the time he was present at petitioner's counsel table (Pet. App. B4 to B5; Tr. 486-487).

463). Because the ALJ threatened to draw an adverse inference if the tapes were not included in the record, the General Counsel introduced nine tapes into evidence, as well as a written text of Supervisor Weise's speech that had not been produced by petitioner's counsel until that day (Tr. 991, 350, 355-356; G.C. Ex. 25-32; Ch. P. Ex. 1).[6] The nine tape recordings were later transcribed by a professional sound studio (Tr. 363-364). During the September adjournment of the hearing, the Board's Regional Director reviewed the written text of Supervisor Weise's speech produced by petitioner and decided to withdraw the Section 8(a)(1) allegation based upon Weise's speech (Tr. 991, 672; R. Ex. 24, at 7). None of the nine transcribed tape recordings related to, or formed the basis for, any unfair labor practice findings by the administrative law judge (Pet. App. B8; Tr. 991-993).

Based upon the foregoing incidents and conduct the administrative law judge repeatedly rebuked the General Counsel's attorneys for their "lack of professionalism" at trial, but determined that a mistrial was not warranted (Pet. App. A2, C58; Tr. 1310-1311, 1602). The Board also criticized the General Counsel's lawyers for their "injudicious conduct" at trial. The Board concluded, however, that petitioner had not suffered prejudice as a result of the conduct of the General Counsel's attorneys, and affirmed the ALJ's denial of a mistrial (Pet. App. B4 to B5, B8, B11, C58).

B. The Decision of the Court of Appeals

The court of appeals denied petitioner's petition for review and enforced the Board's order. Petitioner had not challenged the Board's findings of repeated violations of

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[6]The Weise speech was included in the nine tapes introduced in evidence by the General Counsel. None of the other tape recordings contained evidence of any alleged unfair labor practice (Tr. 326).

Section 8(a)(1) of the Act in the weeks before the election. The court of appeals sustained the Board's finding, which was challenged, that one employee had been illegally discharged for union activities in violation of Section 8(a)(3) of the Act (Pet. App. A2). Turning to the alleged procedural irregularities in the administrative hearing, the court of appeals found that petitioner had not been prejudiced by the General Counsel's untimely production of witness statements at trial, because the statements themselves did not contain "any substantial ammunition for impeachment" and because the testimony of the affected witnesses was not crucial to the outcome of the case (Pet. App. A3 to A4). The court also found "harmless" any abuse of discretion which the administrative law judge may have committed in refusing to order the production of Department of Labor statements, or to strike the testimony of the witnesses who had made the statements, because the Board's conclusion that petitioner had committed unfair labor practices warranting a remedial order would remain undisturbed even if every finding supported by the testimony of these witnesses were to be set aside (Pet. App. A4 to A6). The court also concluded that the Board had properly exercised its discretion by declining to declare a mistrial based upon the General Counsel's trial conduct because petitioner had not been prejudiced by that conduct (Pet. App. A2 to A3, A6).

## ARGUMENT

The decision of the court of appeals is a correct application of settled principles to the circumstance of this particular case, and does not conflict with any decision of this Court or any other court of appeals. Further review is accordingly unwarranted.

1. The court of appeals properly rejected petitioner's contention (Pet. 17-18) that the tardy production of statements made by the General Counsel's witnesses required

that the Board's order be set aside. The court below agreed with petitioner that tardy production of witness statements is undesirable and may reduce the effectiveness of cross-examination by affording the party calling the witness a chance to discuss discrepancies between the statements and his previous testimony. However, petitioner did not show that any of the untimely-produced statements differed from any of the witnesses' hearing testimony so as to be of potential use during cross-examination. Moreover, the court of appeals "made an effort to compare the testimony of those witnesses whose statements were produced after the initial cross-examination had been completed" and concluded that the statements were "consistent with the testimony given" and "would not have afforded [petitioner] any substantial ammunition for impeachment" (Pet. App. A3 to A4). Petitioner has not challenged the court of appeals conclusion that because substantial independent evidence supported the Board's determination of unfair labor practice violations deletion of the affected witnesses' testimony would not, in any event, have altered the outcome of the case (Pet. App. A5 to A6).

Contrary to petitioner's further contention (Pet. 14-17), the court of appeals also properly concluded that petitioner was not prejudiced by the administrative law judge's refusal to order production of Department of Labor affidavits in existence at the time witnesses Berg and Harm were made available for additional cross-examination. The court agreed with petitioner that such statements must ordinarily be produced under the court's prior ruling in *Harvey Aluminum (Incorporated)* v. *NLRB*, 335 F.2d 749, 753-755 (9th Cir. 1964). However, the court concluded that the error of the administrative law judge, if any, was "harmless" since the Board's conclusion that petitioner had been guilty of unfair labor practices would retain its validity even if every finding resting in any way upon the affected witness testimony were set aside (Pet. App. A5 to A6). In the absence of

any showing of actual prejudice to petitioner, the court properly declined to overturn the Board's finding and grant a mistrial.

Contrary to petitioner's contention (Pet. 15-16), the decision of the court of appeals does not conflict with decisions of this Court respecting the Jencks Act, 18 U.S.C. 3500.[7] This Court has recognized that improper production of witness affidavits under the Jencks Act is not per se prejudicial and constitutes harmless error absent some showing of actual prejudice to the affected party. *Goldberg* v. *United States*, 425 U.S. 94, 110-111 (1976), on remand, 582 F.2d 483, 490 (9th Cir. 1978); *Killian* v. *United States*, 368 U.S. 231, 243-244 (1961); *Rosenberg* v. *United States*, 360 U.S. 367, 370-371 (1959). The court of appeals' holding is also in accord with rulings of the appellate courts. *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974, 981 (9th Cir.), cert. denied, 389 U.S. 913 (1967); *Carlisle Paper Box Co.* v. *NLRB*, 398 F.2d 1, 5 (3rd Cir. 1968); *NLRB* v. *Bear Brand Roofing, Inc.*, 312 F.2d 616, 618-619 (10th Cir. 1962); *NLRB* v. *Safeway Steel Scaffolds Co.*, 383 F.2d 273, 278 (5th Cir. 1967), cert. denied, 390 U.S. 955 (1968); *United States* v. *Pope*, 574 F.2d 320, 326 (6th Cir.), cert. denied, 436 U.S. 929, 949 (1978).

In view of the foregoing there is no merit to petitioner's contention (Pet. 8, 15) that the court of appeals "must have presumed" that the Department of Labor affidavits of witnesses Harm and Berg contained no impeaching evidence.

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[7]Contrary to petitioner's apparent contention (Pet. 3-6, 15-17), the Board's rules, not the Jencks Act, govern the production of witness statements in NLRB hearings. 29 C.F.R. 102.118(b)(1); *Ra-Rich Manufacturing Corp.*, 121 N.L.R.B. 700, 701-702 (1958). Case law regarding application of the Jencks Act in criminal proceedings is therefore applicable only by analogy to administrative proceedings before the NLRB, which do not involve the imposition of criminal sanctions.

The fact that the contents of these statements are unknown does not support petitioner's contention for, as the court of appeals observed, numerous unfair labor practices were found which were not based on, or related to, the testimony of the two witnesses who had made statements to the Department of Labor. Thus, even if "any finding dependent upon the affected witnesses were set aside, still the conclusion reached that [petitioner] had been guilty of unfair labor practices would remain" (Pet. App. A6). The court thus did not presume that the Department of Labor affidavits contained no harmless material; in effect it assumed the worst, but recognized that the finding of unfair labor practice liability and the Board's remedial order would not have been different, in any event. The court's finding of harmless error was thus entirely consistent with the strictest possible application of the harmless error doctrine. See *Goldberg* v. *United States, supra,* 425 U.S. at 109-111 & n.21; *NLRB* v. *Safeway Steel Scaffolds Co., supra,* 383 F.2d at 278.[8]

2. Similarly, no issue warranting further review is presented by the court of appeals' disposition of petitioner's objections to the General Counsel's conduct regarding the examination of documents on petitioner's counsel table, the attempt to tape record a General Counsel's witness, and the purported attempt to conceal exculpatory evidence, or to

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[8]Petitioner's contention (Pet. 16) that the General Counsel "intentionally" and "deliberately" refused to produce Department of Labor affidavits misapprehends the procedural record here. The administrative law judge refused to order production of these affidavits; the General Counsel's attorneys' refusal to produce these documents merely accorded with the trial judge's order. If petitioner wished these affidavits to appear in the record it could have subpoenaed them and introduced them in evidence, as the administrative law judge observed (Tr. 1437-1438, 1411). *NLRB* v. *Seine & Line Fishermen's Union, supra,* 374 F.2d at 982.

the cumulative effect of the procedural irregularities at trial. As the court pointed out (Pet. App. A2 to A3):

> The record reveals that the administrative law judge (ALJ) was keenly aware of all the acts of counsel leading to these charges, and on some occasions rebuked counsel quite severely for them. The record does reveal a "lack of professionalism," as the ALJ characterized it, but it does not appear that prejudice resulted. The NLRB, in view of the decision of the ALJ, noted each incident and specifically found that [petitioner] had not been prejudiced. Our review reveals no prejudice.

The holding of the court of appeals is in accord with the established principle that procedural irregularities at trial warrant a new hearing only where actual prejudice has occurred. *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943); *NLRB* v. *Seine & Line Fishermen's Union*, *supra*, 374 F.2d at 981; *NLRB* v. *Phaostron Instrument & Electronic Co.*, 344 F.2d 855, 858 (9th Cir. 1965); *United States* v. *Pope*, *supra*, 574 F.2d at 326.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfuliy submitted.

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